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Supreme Court of the United States

OCTOBER TERM, 1964

No. 31

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, PETITIONER,

vs.

UNITED AIR LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1964
CERTIORARI GRANTED APRIL 20, 1964

SUPREME COURT OF THE UNITED STATES

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[fol. A] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,176

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC., Defendant-Appellee.

Appeal from Judgment and Order of United States District Court for the Southern District of Ohio, Western Division at Cincinnati.

Appendix for Plaintiff-Appellant—Filed November 19, 1962

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

Civil Action No. 4904

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Plaintiff,

vs.

UNITED AIR LINES, INC., Defendant.

RELEVANT DOCKET ENTRIES

11- 9-61	Complaint filed.
12-26-61	Motion of Defendant to Dismiss or for Summary Judgment, together with Notice of same. and Memorandum.

12-26-61 Affidavit of Charles M. Mason, filed.

12-26-61 Affidavit of Pate Hutchens, Jr.

12-26-61 Affidavit of S. Szalma

2-23-62 Plaintiff Motion for Summary Judgment and Notice, filed.

3-12-62 Supplemental Affidavit of Charles M. Mason—filed.

8- 9-62 Memorandum Opinion—of the Court, holding that Defendant's Motion to dismiss for lack of jurisdiction is found to be well taken—filed.

8-29-62 Order of Court dismissing the Complaint, Further denying respective parties Motions for Summary Judgment and that plaintiff pay the costs of action.

8-30-62 Certified copy of Order mailed to Counsel for Pltf and Deft

9-10-62 Notice of Appeal filed by plaintiff.

[fol. 2]

9-10-62 Certified copy of Notice of Appeal mailed to Mr. Jack G. Evans, atty. for deft.

9-10-62 Bond on Appeal filed.

9-10-62 Certified copy of Notice of Appeal sent to U. S. Court of Appeals.

IN THE UNITED STATES DISTRICT COURT

COMPLAINT—Filed November 9, 1961

Now comes the plaintiff, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and for its cause of action states:

1. This is an action for Declaratory Judgment as authorized by Sections 2201 and 2202 of Title 28 of the United States Code. (28 U.S.C.A. Sections 2201 and 2202). It is brought because there now exists, as will hereinafter be more fully described, an actual controversy between the parties with respect to maintenance of a collective bargaining agreement executed pursuant to the provisions of the Railway Labor Act (45 U.S.C.A. Sections 151 et seq.).

2. The jurisdiction of this Court derives from the Act of June 25, 1948 (28 U.S.C.A. Sections 1331 and 1337), and from said Act as amended by the Acts of July 26, 1956, and July 25, 1958 (28 U.S.C.A. Section 1332). The matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and involves the Railway Labor Act (45 U.S.C.A. Sections 151 et seq.). As hereinafter more fully described, full diversity of citizenship exists between plaintiff and defendant.

[fol. 3] 3. The plaintiff, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter called "the Brotherhood"), is an unincorporated standard national and international railway labor organization representing under the Railway Labor Act (45 U.S.C.A. 151 et seq.) various employees of numerous railroads and air carriers operating within the United States. Its principal office and headquarters is located at 1015 Vine Street, Cincinnati 2, Ohio.

4. The defendant, United Air Lines, Inc. (hereinafter called "United"), is a corporation organized and existing under the laws of the State of Delaware. United engages in the air transportation of mail, persons, and property over various routes within the United States pursuant to the authority contained in certificates of public convenience

and necessity issued to United by the Civil Aeronautics Board, a Federal agency, under the provisions of the Federal Aviation Act of 1958 (49 U.S.C.A. Sections 1301 et seq.) and its predecessor statute, the Civil Aeronautics Act of 1938 (49 U.S.C.A. Sections 401 et seq.). United provides air service to various cities within the State of Ohio pursuant to the authorizations contained in such certificates including Akron, Columbus, Dayton, Cleveland, Toledo, and Youngstown.

5. United is a common carrier by air engaged in interstate commerce within the meaning of the provisions of Sections 201 and 202 of the Railway Labor Act (45 U.S.C.A. 181 and 182) and as such is subject to provisions of that statute as set forth therein.

6. Venue in this action lies with this Court pursuant to the provisions of Title 28, Section 1391 of the United States [fol. 4] Code (28 U.S.C.A. Section 1391) by reason of the fact that United is licensed to do business in this judicial district and in fact is doing business within such judicial district.

7. On May 13, 1947, in a proceeding identified as Case R-1735, the National Mediation Board, a federal agency, acting pursuant to the provisions of the Railway Labor Act, particularly Section 2, Ninth, thereof, certified the Brotherhood as the designated representative for the purposes of that Act of all employees of Capital Airlines, Inc. a Delaware corporation (hereinafter called "Capital"), a common carrier by air engaged in interstate commerce, in the craft or class of clerical, office, stores, fleet, and passenger service. Pursuant to this certification the Brotherhood and Capital executed a collective bargaining agreement, effective August 1, 1948, covering rates of pay, rules and working conditions of such craft or class of employees. Such agreement was revised from time to time in accordance with the provisions of the Railway Labor Act.

8. On October 21, 1958, the Brotherhood served on Capital a notice, as required by Section 6 of the Railway Labor Act (45 U.S.C.A. Section 156) proposing various changes in the existing collective agreement between the Brother-

hood and Capital. Negotiations between the Brotherhood and Capital on the subjects contained in the notice of October 21, 1958, failed to result in an agreement. Therefore, on June 8, 1959, the Brotherhood filed an application with the National Mediation Board invoking that agency's mediation services in the dispute under Section 5 of the Railway Labor Act (45 U.S.C.A. 155). This application was accepted [fol. 5] by the National Mediation Board which took jurisdiction of the dispute and assigned the proceeding Case No. A-6037.

9. Mediation sessions were thereafter held in the dispute under the auspices of a Mediator assigned by the National Mediation Board during various dates in June and July, 1959. Such mediation was successful in bringing about a settlement of the dispute through the execution of an agreement between the Brotherhood and Capital on August 3, 1959, revising the existing collective bargaining agreement between the parties. A copy of this agreement is attached hereto as Exhibit A. Article 1, paragraph (b) of such agreement of August 3, 1959, reads as follows:

> "All provisions of this Agreement shall be binding upon the successors or assigns of the Company and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved."

This agreement has at all times since August 3, 1959, been in full force and effect.

10. On August 11, 1960, Capital and United entered into an agreement of merger, providing for the merger of Capital into United as the surviving corporation. Section III, paragraph 1, of this merger agreement reads as follows:

> "On the effective date of the merger:
>
> "1. UNITED shall possess all the rights, privileges, powers and franchises as well of a public as of a pri- [fol. 6] vate nature, and shall be subject to all of the

restrictions, disabilities and duties of each of the Constituent Corporations; and all and singular, the rights, privileges, powers and franchises of the Constituent Corporations, and all property, real, personal and mixed, and all debts due to each of the Constituent Corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of the Constituent Corporations shall be vested in UNITED: and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of UNITED as they were of the Constituent Corporations, and the title to any real estate vested by Corporations, and the title to any real estate vested by deed or otherwise in each of the Constituent Corporations shall not revert or be in any way impaired; but all rights of creditors and all liens upon any property of each of the Constituent Corporations shall be preserved unimpaired, and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to UNITED, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

11. Said provision of the merger agreement is in accordance with the requirements of the law of the State of Delaware (Sec. 328 Delaware General Corporation Law) which provides that liabilities of corporations existing under the laws of that state shall not in any way be lessened by the consolidation or merger of two or more corporations.

12. Neither Capital nor United gave any notice of the proposed merger to the Brotherhood in direct violation of the provisions of said Article 1, paragraph (b) of the collective bargaining agreement between the Brotherhood and Capital. The Brotherhood learned of the Capital-United merger agreement only through the newspapers on or about August 12, 1960.

[fol. 7] 13. On August 16, 1960, the Brotherhood General Chairman on Capital wrote both Capital and United, calling

attention to Article 1, paragraph (b) of the collective bargaining agreement of August 3, 1959, and requested a conference thereunder. United declined such conference. On November 28, 1960, Brotherhood representatives met with officials of Capital. The Capital representatives stated they could not negotiate an agreement relating to employees which would be effective upon consummation of the merger or binding on United.

14. On August 11, 1960, Capital and United filed a joint application with the Civil Aeronautics Board for approval of the merger agreement under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C.A. Section 1378) and such other sections of that statute as might be applicable. The Brotherhood appeared in the hearings before the Civil Aeronautics Board and requested that, if such Board should approve the proposed Capital-United merger, the Board impose as a condition of its approval a requirement that United take over and apply the Brotherhood-Capital collective bargaining agreement of August 3, 1959, to those employees of Capital covered by the agreement. On April 3, 1961, the Board issued its Order No. E-16605, approving the proposed merger. The Board did not accede to the Brotherhood's contention that the Capital acquisition should be "conditioned" upon the assumption by United of the collective bargaining agreement. Neither did it purport to pass on the issue of whether United would be justified, as a matter of contract or labor law, in ignoring the agreement.

15. On May 9, 1961, representatives of the Brotherhood [fol. 8] met with officials of United concerning the application of the Brotherhood-Capital agreement of August 3, 1959, to employees of Capital covered by the agreement upon the consummation of the merger. United took the position that it had no responsibility with respect to said agreement and would not recognize any rights of any Capital employees thereunder after consummation of the merger.

16. The Brotherhood, on May 29, 1961, prior to the consummation of the merger, filed an application with the National Mediation Board pursuant to Section 5, Second of the Railway Labor Act (45 U.S.C.A. Section 155 Second)

for an interpretation of the application or meaning of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital. On July 11, 1961, the National Mediation Board conducted a hearing on the Brotherhood application. United appeared at this hearing and opposed the application. On August 28, 1961, the National Mediation Board issued an opinion, a copy of which is attached hereto to Exhibit B. With respect to the language of Article 1, paragraph (b) of the agreement of August 3, 1959, the National Mediation Board found as follows:

> "After reviewing the record of mediation in NMB Case No. A-6037, as well as the transcript of hearing and briefs submitted by the Brotherhood and United Air Lines, Inc., this Board is of the opinion that the language of Article 1(b) of the agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambiguous. In other words, the language means just what it says and we so find."

17. Thereafter, the Brotherhood by letter dated Septem-
[fol. 9] ber 1, 1961, requested a meeting with United to discuss the situation in the light of the interpretation of the agreement of August 3, 1959, set forth in the decision of the National Mediation Board. By letter dated September 21, 1961, United refused such a meeting.

18. The merger was consummated on or about June 1, 1961, and since that date the approximately 2,700 or more employees of Capital in the craft or class covered by the agreement of August 3, 1959, between the Brotherhood and Capital have been employees of United. That carrier has refused to apply the terms of such agreement to any of these employees or to recognize any rights of any of these employees thereunder. Among those rights are matters relating to seniority, basis of pay, protection against arbitrary discipline and discharge, procedures for the adjustment of grievances and against arbitrary transfer, provisions for the health and safety of employees, and various benefits such as sick leave allowances, overtime allowances, group insurance and pension benefits, maintenance of union membership and check off of union dues.

19. United's refusal to apply the provisions of the agreement of August 3, 1959, between the Brotherhood and Capital to any of the employees of Capital in the craft or class covered by such agreement and who became employees of United upon consummation of the merger constitutes a violation of the provisions of Article 1 paragraph (b) of said agreement, which makes the provisions thereof binding upon the successors or assignees of Capital.

20. United's refusal to apply the provisions of the agreement of August 3, 1959, between the Brotherhood and Capi- [fol. 10] tal to any of the employees of Capital in the craft or class covered by such agreement and who became employees of United upon consummation of the merger constitutes a violation of the provisions of Section III paragraph 1 of the merger agreement of August 11, 1960, between Capital and United which provides, among other things, that all liabilities and duties of Capital shall attach to United and may be enforced against it to the same extent as if said liabilities and duties had been incurred or contracted by United.

21. United's refusal to apply the provisions of the agreement of August 3, 1959, between the Brotherhood and Capital to any of the employees of Capital in the craft or class covered by such agreement and who became employees of United upon consummation of the merger constitutes a violation of Section 328 Delaware General Corporation Law, which provides that the liabilities of corporations existing under the laws of that state shall not in any way be lessened by the consolidation or merger of two or more corporations.

22. United's refusal to apply the provisions of the agreement of August 3, 1959, between the Brotherhood and Capital to any of the employees of Capital in the craft or class covered by such agreement and who became employees of United upon consummation of the merger constitutes a violation of the provisions of Section 2, First, of the Railway Labor Act (45 U.S.C.A. Section 152 First) which makes it the duty of all carriers, their officers and agents, to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes arising out of the application of such

agreements in order to avoid any interruption to commerce [fol. 11] or to the operation of any carrier.

23. United's refusal to apply the provisions of the agreement of August 3, 1959, between the Brotherhood and Capital to any of the employees of Capital in the craft or class covered by such agreement and who became employees of United upon consummation of the merger constitutes a violation of the provisions of Section 2, Seventh, of the Railway Labor Act (45 U.S.C.A. 152, Seventh) which prohibits any carrier, its officers or agents from changing the rates of pay, rules or working conditions of its employees as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

24. United's refusal to apply the provisions of the agreement of August 3, 1959, between the Brotherhood and Capital to any of the employees of Capital in the craft or class covered by such agreement and who became employees of United upon consummation of the merger constitutes a violation of the provisions of Section 6 of the Railway Labor Act (45 U.S.C.A. 156) by changing the rates of pay, rules or working conditions of its employees embodied in the agreement of August 3, 1959, between the Brotherhood and Capital without complying with the procedures set forth in such Act.

25. By refusing to accept and process grievances of former Capital employees submitted to it in accordance with the provisions of the agreement of August 3, 1959, between the Brotherhood and Capital, United has violated the provisions of Section 204 of the Railway Labor Act (45 U.S.C.A. 184) which requires that all disputes between an employee and a carrier growing out of grievances or out of the inter- [fol. 12] pretation or application of agreements concerning rates of pay, rules or working conditions shall be negotiated between the parties, but failing to reach an adjustment in this manner, the disputes are to be settled by a board of adjustment.

26. The plaintiff Brotherhood has exhausted all of the administrative remedies available to it.

Wherefore, the Brotherhood prays that this Court grant to it the following relief:

(1) That the Court declare the legal rights of the parties with respect to the actual controversy hereinabove described, and their legal relations with respect to the agreement of August 3, 1959;

(2) That the Court declare that United is a successor or assign of Capital within the meaning of the provisions of Article 1, paragraph (b) of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital making the provisions of said agreement binding upon the successors or assigns of Capital;

(3) That the Court declare that United assumed the liabilities and duties of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital by reason of the provisions of Section III, paragraph 1 of the merger agreement of August 11, 1960, between Capital and United;

(4) That the Court declare that by operation of the laws of the State of Delaware, United is bound by the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital;

(5) That the Court issue an injunction enjoining United [fol. 13] from continuing its refusal to apply the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital to employees of Capital covered by that agreement who became employees of United upon the consummation of the merger;

(6) That the Court assess the costs of this action against the defendant and grant to the plaintiff all other legal or equitable relief to which it may be entitled.

James L. Highsaw, Jr., by R.G.H., 620 Tower Building, Washington 5, D. C.;

Leonard D. Slutz, Roy G. Holmes, 900 Tri-State Building, Cincinnati 2, Ohio, Attorneys for Plaintiff.

[fol. 14]

EXHIBIT A TO THE COMPLAINT

(See opposite) ☞

[fol. 14]

EXHIBIT A TO THE COMPLAINT

1959-62

AGREEMENT

between the

CAPITAL AIRLINES, INC.

and

all that class of

CLERICAL, OFFICE, STORES, FLEET AND PASSENGER SERVICE EMPLOYEES

thereon represented by the

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

Effective August 3, 1959

[fol. 15]

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AGREEMENT

between the

CAPITAL AIRLINES, INC.

and

all that class of

CLERICAL, OFFICE, STORES, FLEET AND PASSENGER SERVICE EMPLOYEES

Preamble

THIS AGREEMENT is made and entered into under the terms of the Railway Labor Act, as amended, by and between Capital Airlines, Inc., (hereinafter referred to as the "Company") and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A.F.L - C.I.O., (hereinafter referred to as the "Brotherhood").

Article 1

Scope — Employees Affected

(a) The Brotherhood having been designated and selected by a majority of the employees of the class and craft in an election conducted by the National Mediation Board on May 7, 1947 and having been certified by the National Mediation Board on May 13, 1947, Case R-1735, the Company hereby recognizes the Brotherhood as sole and ex-

clusive bargaining agent for all employees in the class c craft of clerical, office, stores, fleet, passenger service an related employees of the Company working within the co tinental limits of the United States and its possessions.

(b) All provisions of this Agreement shall be bindi upon the successors or assigns of the Company and in ca [fol. 24] of a consolidation or merger, the Company wi notify the Brotherhood at least ninety (90) days prior such consolidation, or merger, and representatives of t Company and the Brotherhood will meet and negotiate f the procedure to be followed and the protection to be a forded the employees involved.

(c) These Articles shall govern the hours of service a working conditions of all the following classifications clerical, office, stores, fleet and passenger service employe of Capital Airlines, Inc., as represented by the Brotherho of Railway and Steamship Clerks, Freight Handlers, E press and Station Employees, subject to the exceptions co tained in Negotiated List No. 1 covering positions desi nated as X-1, X-2 and X-3 and exempt.

Skycap
Janitor
Skycap-Janitor
Lead Skycap
Chief Skycap
Mail Clerk
Cargo Agent
Cabin Service Agent
Senior Cargo Agent
Senior Cabin Service Agent
Reservation Agent
C.T.O. Agent
A.T.O. Agent
Space Control Agent
Senior Reservation Agent
Senior C.T.O. Agent
Senior A.T.O. Agent

Senior Ramp/Ticket Lift Agent
Long Line Control Agent
Operation Agent
Freight Agent
Senior Operation Agent
Senior Freight Agent
Supervising Agent
Chief Key Punch Operator
Junior Statistician
Senior IBM Operators
Supervisor Physical Inventories
Analyst
Aircraft Scheduling Specialists
Agency Sales Auditor
Interline Receivables Auditor
Interline Payables Auditor
CAP Ticket Sales Auditor
Cargo Auditor
Airmail Auditor
Refund Auditor
Statistical Auditor
Research Analyst
Routing Office Manager
Asst. Routing Office Manager
Property Accountant
Asst. District Operations Managers
District Operations Managers
Reservation Sales Managers
Ticket Office Managers
Assistant Manager-Space Control
Storekeepers

[fol. 25]

Traveling Auditors

Internal Auditors
Budget Analysts
Cost Analysts
Interviewers
Senior Accountants
Asst. Manager-Budgeting Group
Asst. Manager-Standards Group
Director of Payrolls Division
Asst. Reservations Managers
Routing Agents
Ramp/Ticket Lift Agent
Apprentice Clerk
Jr. Stenographers
Jr. Clerks
Clerk-Typists
Telephone Operators
Chief Telephone Operators
Stenographers
Intermediate Clerks
Key Punch Operators
Senior Clerks
Semi-Senior Accountants
Stock Clerks
Lead Stock Clerks
Pre Draw and Delivery Clerks
Jr. Buyers
Asst. Manager of Inventory Control
Supervisor Space Control
Chief Clerk Records
Chief Clerk Statistics
Asst. Chief Clerk Statistics
Link Trainer Instructor
Aircraft Records Specialists
Draftsmen

Cashier
Assistant Cashier
Crew Routing Specialist
Assistant Storekeeper
Supervising Stock Clerks
Receptionist
Supervisor-Air Travel Administration
Tabulating Group Supervisor
Key Punch Supervisor
Chauffeur
Supervisor of Insurance
Economist
Supervisor of Manuals
Supervisor-Ground Operations Training
Manager-Passenger Revenue Branch
Manager-Refund and Cargo Branch
Secretaries
Electronic Programmers
Manual Technician
Operations Training Instructor
Asst. Mgr. Machine Accounting Branch
Manager of Inventory Control
Senior Buyers
Univac Programmer
Univac Agent
Univac Supervisors
Mgr. Univac Center
Asst. Mgr. Univac Center
Electronic & Methods Research Analyst
Passenger Coordinators
Routing Clerks
Chief Clerk, Duplicating

Chief Clerk, Mail Room
Manager-Central Statistics Branch
[fol. 26]
Supervisor-Field and Internal Auditing
Supervisor-Accounts Receivable, Cash Disbursements and Air Travel
Special Projects Accountant
Mgr. Fiscal & Contract Division
Asst. to Director-Revenue Accounting
Purchasing Manager
Accountant & Tax Assistant
Chief Clerk Revenue Audit
Passenger Service Representative
District Managers—Operations
Manager Personnel Records
Mgr. Budgeting and Cost Branch
Manager Univac System
Manager-Machine Accounting Branch
Staff Manager Training
Manager of Employment
Passenger Service Manager
Sales Representative
Supervisor Central Files
Asst. to Supervisor of Flight Schedules
Customer Services Manager
Asst. Ticket Auditors-Station Sales
Asst. Director Payrolls

Manager Salary Payroll
Mgr. Hourly and Flight Payroll
Forms Control Officer
Chief Accountant

and other similar positions and employees performing similar work.

• • • • • • •

[fol. 27]

Article 30

Discipline and Discharge

(a) An employee who has been in the employ of the Company for more than ninety (90) paid work days shall not be disciplined or dismissed without written notification of such action, and said notice shall contain the precise charge. The Company must bring the charge within seven (7) days after knowledge of the offense. A hearing thereon shall be had provided that such employee makes written request for such hearing within seven (7) days after receipt of notification to their immediate supervisor.

(b) At such hearing, employee may be represented only by one or more Duly Accredited Representatives.

(c) An employee may be held out of service by the Company pending such hearing.

(d) Such hearing shall be held within seven (7) days of the receipt of the employees written request and a written decision shall be rendered within seven (7) days after completion of hearing. The time limits provided in this Article may be extended by mutual agreement.

(e) The right of appeal by employees or their Duly Accredited Representatives in the regular order of succession up to and including the highest Official designated by the Management to whom appeals may be made is hereby established. When an appeal is taken, further hearing shall be granted if requested of the Official to whom appeal is made. Appeals will be registered within forty-five (45) days after decision is appealed. Hearings and decisions on appeals will be given within a reasonable time.

1. *Supervisors and Officials designated in succession of appeal steps:*

Operations — District Operations Manager or District Manager, Ground Operations Manager or Assistant.
Reservations — Reservations Sales Manager, District Sales Manager, or District Manager, Vice President & Sales Manager.

Ticket Counters — Airport Ticket Office Manager, District Sales Manager, or District Manager, Vice President & Sales Manager.

[fol. 28] *Stores (System)* — District Operations Manager, Director of Procurement and Supply.

Stores (Washington) — Supply Manager, Director of Procurement and Supply.

Treasury — Section Supervisor, Division Head (Controller-Revenue-Audit-Procurement and Supply).

General Office — Section Supervisor, Division Head.

Routing Offices — Routing Office Manager, Manager Flight Scheduling, Director of Flying.

2. Further appeal if taken, may be made first to the Personnel Department, then to the highest officer of the department affected.

(f) Hearings shall be held whenever possible at such time so as not to cause employees to lose rest or time. Employees shall have reasonable opportunity to secure the presence of Duly Accredited Representatives and/or necessary witnesses. The Duly Accredited Representatives shall have the right to question all witnesses.

(g) At hearings if an official record is desired by both parties, the cost shall be borne equally. If official record is requested by either party, cost shall be borne by party requesting same. In the event either party requests copies of such record, cost shall be shared equally.

(h) All written statements made a matter of record at hearings will be signed by person or persons submitting statements and copies furnished to the other party in the dispute.

(i) The Personnel record of the employee will reflect the final decision of the hearing.

(j) Any dispute not settled under the provisions of this article may be referred to the Board of Adjustment as provided for in Article 43 of this Agreement by the Company or properly authorized Duly Accredited Representative within ninety (90) days.

(k) The Brotherhood shall be notified of all hearings and shall be privileged to participate in such hearings.

[fol. 29]

Article 31

Adjustment of Grievances

(a) A Duly Accredited Representative who believes any provision of this Agreement has not been or is not being properly applied or interpreted shall have the right within ten (10) days after such application has been ascertained by the Brotherhood to protest such application in writing to the supervisor, as provided for in Article 30 (e), who shall evaluate such protest and render a decision in writing within ten (10) days.

(b) If the case is not settled, it may be appealed in writing within forty-five (45) days to the department head or other equivalent officer designated by the Company and in the established order of succession up to and including the highest official or their representative, each of whom, shall render a decision in writing within thirty (30) days.

(c) An employee who believes that he has been or is being unjustly dealt with shall have the right to present his grievance in writing within ten (10) days to his supervisor, as provided for in Article 30 (e), who shall evaluate the grievance and render a decision in writing within ten (10) days.

(d) If the grievance is not settled, it may be appealed in writing within forty-five (45) days to the department head or other equivalent officer and in the established order of succession up to and including the highest official or

their representative, each of whom shall render a decision in writing within thirty (30) days.

(e) Any dispute not settled under the provisions of this Article may be referred to the Board of Adjustment as provided for in Article 43 of this Agreement by the Company or properly authorized Duly Accredited Representative within ninety (90) days.

(f) When time is claimed in writing and such claim is disallowed, the employee making the claim and the Local Chairman shall be notified in writing the reason for non-allowance.

. . . . . .

[fol. 30]

Article 43

Board of Adjustment

(a) There is hereby established, pursuant to the provisions of the Railway Labor Act, as amended, a Capital-Brotherhood Board of Adjustment, hereinafter referred to as the "Board" which shall handle such matters as are properly referred to it.

(b) The Board shall be composed of four (4) members; two (2) selected by the Company and two (2) selected by the Brotherhood.

(c) The members of the Board shall continue to serve until such time as the parties select their successors, which may be done at any time except during the time when the Board is holding session.

(d) This Board shall have no jurisdiction whatsoever over proposals or disputes relating to general changes in hours of work, rates of pay, rules and working conditions.

(e) The Board will meet in Washington, D. C. (unless otherwise mutually agreed) on proper call by the Chairman or Vice-Chairman and shall continue in session until all matters before it are heard.

(f) The members of the Board shall select a Chairman and Vice-Chairman whose term of office shall be one (1)

session, provided that the offices of Chairman and Vice-Chairman shall be filled alternately by a member representative of the Company and a member representative of the Brotherhood; that is, when a Brotherhood member is Chairman a Company member shall be Vice-Chairman, and vice versa.

[fol. 31] (g) The Chairman, or in his absence the Vice-Chairman, shall preside at meetings of the Board, and each member of the Board shall have a vote on the adoption of all decisions of the Board.

(h) A dispute submitted to the Board in the form of a joint submission agreed to by all parties, shall state:

1. The name of the employee involved.
2. A statement that an attempt has been made to obtain an adjustment of the dispute in the manner provided in Articles 30 and 31 of this Agreement, and that the parties have failed to reach in such manner a satisfactory adjustment.
3. A statement of the nature of the dispute.
4. The position or contention of the Brotherhood.
5. The position or contention of the Company.

(i) If the parties to the dispute cannot agree on a joint submission, either party may submit the dispute by petition which shall include all the information required in Items 1, 2 and 3 of paragraph (h) of this Article and also the position of the party submitting the dispute. Upon receipt of an ex parte submission, the Chairman shall notify the other party to the dispute at least twenty (20) days prior to the date set for the hearing, and said other party shall have the right within fifteen (15) days to file seven (7) copies of statement of its position with the Chairman of the Board. Upon receipt of the statement from the other party, the Chairman will promptly furnish each party with a copy of the statement of the other party's position.

(j) Five (5) copies of each joint submission, or seven (7) copies of each ex parte petition, shall be delivered to

the Chairman. Upon receiving a joint submission or ex parte petition, the Chairman and Vice-Chairman shall set a day for hearing which shall be within sixty (60) days. The Board shall give notice of all hearings to all parties involved in any dispute submitted to it and the same right of representation before the Board will be afforded as in Articles 30 and 31. Such Representatives may present the dispute in such manner as they deem to their best interest.

(k) The Board may summon any necessary witnesses and call for relevant non-confidential records of the Company and the employee involved.

[fol. 32] (l) A majority vote of all members of the Board shall be competent to make a finding or a decision with respect to any dispute properly submitted to it, and such finding or decision shall be final and binding upon the parties to such dispute.

(m) Upon failure of the Board to agree upon a finding or decision because of inability to secure a majority vote of all members of the Board, the Board shall notify the parties to the dispute who will meet and select an impartial person to be known as "Referee" to sit with the Board as an additional member thereof in the further hearing and determination of the case. If the parties are unable to agree upon the selection of such additional member, the Company and/or the Brotherhood may then within sixty (60) days request the National Mediation Board to name such additional member as a "Referee", and when so named, the Board shall immediately arrange for a determination of the dispute by such "Referee."

(n) Findings and decision of the Board shall be stated in writing, and in each case a copy of the finding or decision shall be furnished the Company, the Brotherhood and such employee or employees are are involved in the dispute. If a dispute arises as to the interpretation of the findings or the decision, upon request of the Company, or the Brotherhood, the Board, as finally constituted, shall interpret the findings or decision in the light of the facts stated as evidence presented in connection with its record and hearing of the case.

(o) The Board shall keep a complete and accurate record of all matters submitted for its consideration and of all findings and decisions made.

(p) All expenses of the Board, including those incurred by reason of participation of a "Referee" in the determination of the controversy, as herein provided, shall be borne one-half by the Company and one-half by the Brotherhood. The salary or compensation of members of the Board shall be paid by the parties selecting such members. Board members who are employees of the Company shall be granted necessary leaves of absence. Subject to being available, Board members shall receive free transportation over the lines of the Company from point of duty to point of meeting and return for the purpose of attending meetings of the Board.

[fol. 33] (q) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the witnesses called or summoned by it. So far as space is available, witnesses who are employees of the Company shall receive free transportation over the lines of the Company or the lines of other companies with which the Company has exchange or reciprocal transportation agreements from point of duty or assignment to the point at which they must appear as witnesses, and return, to the extent permitted by law.

(r) It is understood and agreed that each and every Board member shall be free to discharge his duty in an independent manner without fear that his individual relations with the Company or with the employees hereunder may be affected in any manner by any action taken by him in good faith in his capacity as a Board member. The parties hereto further mutually agree that each party shall and will specifically instruct each Board member selected, that he shall at all times while serving in that capacity act not as a partisan or advocate of partisan group or cause, but shall act and serve solely to render impartial findings and just decisions.

Article 44

Duration

This Agreement, entered into 3rd day of August, 1959, shall become effective as of August 3, 1959, except for wages, and shall continue in full force and effect until February 1, 1962, and thereafter unless thirty (30) days written notice is served by either party signatory thereto as provided in the Railway Labor Act, as amended.

Wages shall become effective as shown on Attachment A and shall continue in full force and effect until February 1, 1962, and thereafter unless thirty (30) days written notice is served by either party signatory thereto as provided in the Railway Labor Act, as amended.

Wages shall become effective as shown on Attachment A and shall continue in full force and effect until February 1, 1962, and thereafter unless thirty (30) days written notice is served by either party signatory thereto as provided in the Railway Labor Act, as amended.

[fol. 34]

For Capital Airlines, Inc.
S/Robert J. Wilson
Vice President

WITNESSED:

S/R. M. Averill
S/H. G. Biermann
S/B. W. Gamborg
S/Rex D. Garrell

For Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees

S/T. L. Creekmore
General Chairman

WITNESSED:

S/Doyle McMahan
Vice General Chairman
S/Arthur W. Read
Vice General Chairman
S/William Kendall
Vice General Chairman

S/Paul Rhoads
Vice General Chairman

APPROVED:

S/C. L. Dennis
Vice Grand President

* * * * * * *

[fol. 35]

UNION SECURITY AGREEMENT

between

CAPITAL AIRLINES, INC.

and

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

representing

CLERICAL, OFFICE, STORES, FLEET AND PASSENGER SERVICE AND RELATED EMPLOYEES

This Agreement is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between Capital Airlines, Inc., hereinafter referred to as the "Company", and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, hereinafter referred to as the "Brotherhood", as representative of the employees in the classifications listed in Article 1 of the collective bargaining agreement between the parties hereto dated July 29, 1959, amending the agreement of January 1, 1952.

NOW, THEREFORE, it is mutually agreed as follows:

There is hereby established a Union Security and Dues Check Off provision for employees of Capital Airlines, Inc., covered by the terms of the basic agreement above referred to, subject to the following conditions and provisions:

1. Except as set forth in paragraph 2, hereof, each employee who on the 1st day of February, 1959, was a member in good standing of the Brotherhood in accordance with the Brotherhood's "Constitution of the Grand Lodge, System Board and Local Lodges" and each employee who becomes a member of the Brotherhood after such date shall, as a condition of continued employment, maintain his membership in good standing in the Brotherhood, and each employee hired as a new employee of the Company on or [fol. 36] after the 1st day of February, 1959, shall, within ninety (90) days after the commencement of such employment, become a member of and thereafter maintain membership in good standing in the Brotherhood; provided that such condition shall not apply with respect to an employee to whom such membership is not available under the same terms and conditions as are generally applicable to any other member of his classification or with respect to any employee to whom membership is denied or whose membership is terminated for any reason other than the failure of the employee to tender the initiation fees, monthly dues and assessments uniformly required of other employees as a condition of acquiring or retaining membership.

a. For the purpose of this Agreement, "membership in good standing in the 'Brotherhood'" shall consist of the tender or payment by the employee of initiation fees uniformly required of other employees of like status, plus the payment of dues which become due after the effective date of this Agreement for each month during which the employee is actively engaged in a position to which this Agreement is applicable, not later than the last day of the second calendar month, as may be levied in accordance with the procedures set forth in the Brotherhood's "Constitution of the Grand Lodge, System and Local Lodges."

2. This Agreement shall not apply to an employee who occupies one of the positions set forth in Negotiated List No. 1. However, such employee is free to become a member of the organization at his option but he is also free to discontinue his membership at any time.

3. An employee who, under the provisions of this Agreement is required to maintain membership in good standing in the Brotherhood and who subsequently is transferred or assigned to a position not covered by the terms of the basic Agreement, or an employee who is on leave of absence for a continuous period of ninety (90) days, or an employee who is on lay-off status, shall not be required to maintain membership during such period that he may be in a position not covered by the basic Agreement, or on leave of absence, or on lay-off status but he may maintain membership during such period if he desires to do so. However, upon return to a position with the Company [fol. 37] wherein the employee is required to maintain membership under the provisions of this Agreement, he shall within 35 calendar days from the date of his return to such position, be required to become and maintain membership in good standing in the Brotherhood.

4. The Brotherhood, through an authorized officer or representative, will notify the Director of Personnel of the Company in writing of any employee who, by reason of failure to comply with the terms of this Agreement, is not entitled to continued employment. Upon receipt of such notice, the Company will, as promptly as possible, but within ten (10) days of such receipt, so notify the employee in writing by certified mail, by personal delivery evidenced by a receipt. Any such employee who disputes the fact that he is not entitled to continued employment may make written request for a hearing thereon within fifteen (15) days after receiving such notice. Such written request by the employee for a hearing shall be addressed to the Director of Personnel with a copy to the General Chairman of the Brotherhood. Thereafter, hearings will be held and the employee shall be entitled to such appeals as are provided for under the provisions of Articles 30 and 43 of the Basic Agreement. The receipt of a request for a hearing from the employee within the time limited shall operate to stay the action on the termination of employment until the hearing is held and the decision is rendered and, in case of appeal from such decision, until final disposition of the matter pursuant to the provisions of said Articles 30 and 43 of the Basic Agreement. In the event the employee

concerned fails to request a hearing as provided herein, the Company shall proceed to terminate his employment not later than thirty (30) days from the receipt of the above described notice from the Brotherhood except as herein otherwise provided in the case where a qualified replacement is not available. In those cases where the employee files a request for a hearing and it is finally decided that the employee is not entitled to continued employment, the Company shall proceed to terminate his employment not later than twenty (20) days from the date upon which such decision becomes final and is not subject to appeal.

5. An employee terminated under the provisions of this Agreement shall be deemed to have been "discharged for [fol. 38] cause" within the meaning of the terms of the Basic Agreement and the Company shall not be liable for any time or wage or pay claim for any employee terminated by the Company under the provisions of this Agreement pursuant to a written notice by an authorized Brotherhood representative.

6. The General Chairman of the Brotherhood shall notify the Company in writing of the names, titles and addresses of the officers or representatives who are authorized to serve and receive the notices described in this Agreement.

7. Other provisions of this Agreement to the contrary notwithstanding, the Company shall not be required to terminate the employment of any employee until the services of a qualified replacement are available, except that the provisions of this paragraph 7 shall not permit the Company to retain an employee in excess of ninety (90) days from the date upon which the termination would otherwise become effective under the provisions of this Agreement.

8. *Dues Check-Off*

(a) During the life of this Agreement the Company will deduct from the pay of each member of the Brotherhood and remit to the Brotherhood monthly membership dues uniformly levied in accordance with the Rail-

way Labor Act, as amended, and the "Constitution of the Grand Lodge, System Board and Local Lodges" of the Brotherhood provided such member of the Brotherhood voluntarily executes the agreed form, which is hereinafter included in this Agreement to be known as "check-off form", which shall be prepared and furnished by the Brotherhood. The Company will not be required to deduct monthly membership dues from the pay of an employee covered by this Agreement unless (1) the Company has received a check-off form and has not received a notice of revocation thereof, and (2) the dues for the employee conform to the applicable dues for employees of his classification at his point on the system.

• • • • • • • •

[fol. 39]

EXHIBIT B TO THE COMPLAINT

NATIONAL MEDIATION BOARD
Washington

(Letterhead)

INTERPRETATION NO. 93

CASE NO. A-6037

August 25, 1961

In the Matter of

Agreement between Capital Airlines, Inc. and all that class of Clerical, Office, Stores, Fleet and Passenger Service Employes thereon represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

---

On May 29, 1961 the attorneys for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes filed with the National Media-

tion Board an application for interpretation of the agreement reached in Mediation Case No. A-6037, Capital Airlines, Inc. and employes of that carrier represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. This application was made pursuant to Section 5, Second, of the Railway Labor Act.

On June 23, 1961 the Board issued a notice of hearing on this petition and such hearing was held in Washington, D. C., on July 11, 1961 before Board Member Francis A. O'Neill, Jr. Briefs were subsequently filed by United Air Lines, Inc. and the Brotherhood of Railway and Steamship Clerks.

THE ISSUES

The specific question on which the interpretation was requested by the Brotherhood involves the language of Article 1(b) of the agreement reached in mediation on August 3, 1959 between the Brotherhood and Capital Airlines, Inc., reading as follows:

Article 1(b)

"All provisions of this Agreement shall be binding upon the successors or assigns of the Company and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation, or merger, and representatives of the Company and the Brotherhood will meet and nego- [fol. 40] tiate for the procedure to be followed and the protection to be afforded the employees involved."

Article 1(b) in the agreement of August 3, 1959 above quoted resulted from a notice served by the Brotherhood on Capital Airlines, Inc. under date of October 21, 1958 for certain changes, modifications and additions to the agreement then in effect between the parties.

The specific request of the Brotherhood in the application of May 29, 1961 was that the National Mediation Board "determine whether Article 1(b) of the agreement between Capital Airlines, Inc. and the Brotherhood does in fact make the obligation of said agreement binding upon

United Air Lines, Inc. as a successor or assign of Capital Airlines, Inc." This request was modified in a statement made by Vice Grand President Dennis of the Brotherhood during the hearing held on July 11, 1961, and in the reply of the Brotherhood dated July 17, 1961, to the statement of the United Air Lines submitted at the hearing.

The revised position of the Brotherhood reads as follows:

> "It is the position of the Brotherhood that this language means exactly what it says and *should be interpreted as follows:*
>
> "First: All provisions of the agreement shall be binding upon any company which consolidates or merges with Capital or into which Capital is merged or which in any other manner becomes a successor of Capital.
>
> "Second: Capital is required to meet with the Brotherhood at least 90 days prior to the effective date of such consolidation or merger and negotiate for the procedure to be followed in applying the provisions of the agreement upon such consolidation or merger to the employees covered by the agreement and the protection to be accorded such employees upon such consolidation or merger, and to have preserved its freedom of action with the other party to the merger so an effective arrangement can be negotiated."

DISCUSSION

The revised request of the Brotherhood of Railway and Steamship Clerks for this interpretation, as shown above, is in two parts. First, they contend that the language should be interpreted to mean all provisions of the agreement shall be binding upon any company which consolidates or merges with Capital Airlines, or into which Capital Airlines is merged, or which in any other manner becomes [fol. 41] a successor of Capital Airlines. Specific reference to United was eliminated.

In the written statement of Vice Grand President Dennis of the Brotherhood placed in the record during the July 11, 1961 hearing, he states on page 9 that the Brotherhood was of the belief that Section III of the merger agree-

ment between Capital Airlines, Inc. and United Air Lines, Inc., dated August 11, 1960, constituted an assumption by United Air Lines of the obligations of the agreement of August 3, 1959, on which an interpretation is being requested by the Brotherhood. Also, on page 14 of Mr. Dennis' statement in paragraph 5, he states "We do not seek a decision to the effect that either Capital or United has violated any obligation, but simply what is the obligation under the agreement."

After reviewing the record of mediation in NMB Case No. A-6037, as well as the transcript of hearing and briefs submitted by the Brotherhood and United Air Lines, Inc., this Board is of the opinion that the language of Article 1(b) of the agreement of August 3, 1959, reading "all provisions of this agreement shall be binding upon the successors and assigns of the company" is clear and unambiguous. In other words, the language means just what it says and we so find.

It must be pointed out, however, that the mediation agreement was executed on August 3, 1959, while the merger agreement between Capital and United was executed on August 11, 1960. Section 5, Second, of the Railway Labor Act, in our view, delegates no authority to this Board to interpret or construe the merger agreement, which is a document foreign to its processes. The legal authorities cited by the Brotherhood may sustain its position, but this Board lacks jurisdiction to do anything more by interpretation than to construe the instrument produced through its mediatory function. It is true that the language relied upon looks to the future, but can it be said that the quoted provision clothes this Board with authority to pass upon issues which arise out of subsequent developments such as mergers or consolidations? We think not. In sum, we find that the language is clear and unambiguous, but fail to find authority to spell out the rights and obligations of the parties in the situation presented here.

The second request of the Brotherhood is that the Board interpret the following language of Article 1(b) of the August 3, 1959 agreement,

> ". . . and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety

(90) days prior to such consolidation or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved."

[fol. 42] to mean that in the event of a consolidation or merger affecting Capital, that carrier was required to negotiate with the Brotherhood at a time and under circumstances which would leave it free to make an effective agreement for the procedure to be followed and the protection to be accorded Capital employees involved in the merger.

We find as a fact that the quoted language appears in the agreement between Capital Airlines and the Brotherhood of Railway and Steamship Clerks and that such agreement was made in mediation. Under the terms of the agreement, Capital obligated itself to notify the Brotherhood at least ninety (90) days prior to consolidation or merger, following which representatives of the Company and the Brotherhood were obligated to meet and treat on specified subjects.

CONCLUSION

The application for an interpretation, pursuant to Section 5, Second, of the Railway Labor Act, filed by the Brotherhood of Railway and Steamship Clerks, is disposed of in accordance with the foregoing findings.

By direction of the NATIONAL MEDIATION BOARD.

/s/ E. C. Thompson

E. C. Thompson
Executive Secretary

In the United States District Court

Motion of Defendant to Dismiss or for Summary Judgment—Filed December 26, 1961

Defendant United Air Lines, Inc. moves for dismissal of the Complaint or for summary judgment and, as grounds in support thereof, states as follows:

1. The Court is without jurisdiction of this cause since it relates to a dispute as to who are the representatives under the Railway Labor Act of certain of the employees of United Air Lines, Inc. Exclusive jurisdiction to determine such a dispute vests with the National Mediation Board under the provisions [fol. 43] of Section 2, Ninth, of the Railway Labor Act (45 U.S.C. Section 152, Ninth).

2. If the relief requested by plaintiff were granted, United would be required to treat with a bargaining representative for a minority of a craft or class of employees, contrary to the provisions of the Railway Labor Act under which a carrier may be compelled to deal only with the representative designated by a majority of the craft or class.

3. It is apparent from the face of the Agreement between plaintiff and Capital Airlines, Inc. (Exhibit A to the Complaint), which Agreement plaintiff asks the Court to declare is binding upon United, that the Agreement was not intended to be and can not be—either legally or practically—applied to less than the entire craft or class of employees covered under its provisions.

4. The International Association of Machinists now represents approximately 530 employees for whom the plaintiff here seeks representation rights. The relief requested herein cannot be granted without adversely affecting the rights of that labor organization under the Railway Labor Act and under its agreement with United. Hence, if the Court concludes it has jurisdiction of this cause, then the International Association [fol. 44] of Machinists is an indispensable party to this action, but has not been named as a party by the plaintiff.

This motion is based upon the facts alleged in the Complaint and upon the facts set forth in the affidavits submitted herewith of Charles M. Mason, Senior Vice President—Personnel of United, S. Szalma, Staff Assistant—Union Relations, Transportation Services Administration

of United and C. Pate Hutchens, Jr., Administrative Assistant to the Director of Personnel, Field Services of United.

Jack G. Evans, 1200 Union Central Building, Cincinnati 2, Ohio;

H. Templeton Brown, Stuart Bernstein, Edward R. Lev, 231 South La Salle Street, Chicago 4, Illinois, Attorneys for United Air Lines, Inc.

Dinsmore, Shohl, Barrett, Coates & Deupree, Cincinnati, Ohio, MA 1-6747;

Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Illinois, Of Counsel.

AFFIDAVIT OF CHARLES M. MASON TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT—Filed December 26, 1961

State of Illinois,
County of Cook, ss.

CHARLES M. MASON, being first duly sworn, on oath deposes and says:

1. I am Senior Vice President—Personnel of United Air Lines, Inc. ("United"). I am responsible for and have knowledge of all activities of United connected with and bearing upon the employee relations phases of the merger [fol. 45] of United and Capital Airlines, Inc. ("Capital").

2. Immediately prior to the merger, United had approximately 21,000 non-management employees. All but approximately 7,500 of these were represented by labor organizations. United had at that time twelve collective bargaining agreements with nine different labor organizations. These are on a system-wide basis and cover all United employees in the classifications represented by the contracting union.

3. Immediately prior to the merger, Capital had approximately 6,500 non-management employees, approximately 6,000 of whom were represented by labor organizations under six collective bargaining agreements.

4. In United's study of the proposals leading to the merger agreement with Capital, United considered how the employees of Capital would be integrated with United's employees. In view of the requirements of the Railway Labor Act prescribing collective bargaining relationships on a system-wide basis, United determined that it was required to absorb the Capital employees into the applicable United groups of employees, organized or unorganized. Thus each group of Capital employees comparable to an existing group at United would be integrated into the United group, and would be subject to the same rates of pay, rules and working conditions as the United employees. The employees falling into categories under existing United collective bargaining agreements would be subject to those agreements; those in categories unorganized at United would be subject to the same uniform United personnel regulations which establish the rates of pay and working conditions of United employees who are not represented by a labor organization.

[fol. 46] 5. This policy of applying uniform rates of pay and working conditions to all employees in the same categories was, in United's view, not only required under the Railway Labor Act, but as a practical matter was essential. It would have been virtually impossible to plan and operate efficiently if employees working side by side and performing the same duties were to receive different rates of pay and be subject to different working conditions depending upon whether they were United or Capital employees prior to the merger.

6. United's intention respecting its anticipated method of integrating the employees of the two companies in the event the Civil Aeronautics Board ("CAB") was to approve the merger was stated by me as United's first witness testifying on personnel problems relating to the merger in the hearings held by the CAB on the proposed merger. The only labor organization which objected to

United's proposal respecting the integration of Capital employees into existing United groups was the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Brotherhood"), plaintiff herein, which then was the bargaining representative for a group of Capital employees. The Brotherhood requested the Board to impose as a condition on the approval of the merger a requirement that United accept and recognize the labor agreement then in effect between the Brotherhood and Capital. The CAB declined to do so. In its opinion in support of its Order No. E-16605, approving the merger, dated April 3, 1961, the Board stated with respect to this request by the Brotherhood:

> ". . . Capital and United should jointly or severally [fol. 47] give at least forty-five days' notice to the employees who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement. This would then place the matter as a problem to be worked out between the companies and employees, in accordance with regular procedures applicable to the matter of representation and agreement."

Such notice was posted by United and Capital on April 15, 1961, and copies were sent to all authorized representatives of employees of United and Capital, including Brotherhood. A copy of this notice is attached hereto as Exhibit 1.

7. As a condition of its approval of the merger, the CAB imposed certain labor protective provisions as an Appendix to its Order approving the merger. The Order and Appendix are attached hereto as Exhibit 2.

8. The Brotherhood appealed to the United States Court of Appeals for the District of Columbia the issue of the CAB failure to impose as a condition of the merger the requirement that United accept its collective bargaining agreement with Capital and moved for a stay pending review, which motion was denied. United intervened in that proceeding and opposed the motion. In its answer to the motion for stay, the CAB stated:

"The Board did not accede to Brotherhood's contention that the Capital acquisition should be 'conditioned' upon the assumption by United of the collective bargaining agreement. Neither did it purport to pass on the issue of whether United would be justified, as a matter of contract or labor law, in ignoring the [fol. 48] agreement. In these circumstances, and since Government counsel do not know the effect which issuance of the stay here sought might have upon United's operation of the merged system, we leave the argument to the private parties."

After the submission of memoranda and oral argument the Court denied Brotherhood's motion.

9. With respect to the appeal on its merits, the Brotherhood did not meet the original briefing schedule set by the Court of Appeals, moved to extend this schedule, and then moved to postpone the proceeding indefinitely. Finally, on November 6, 1961, the Brotherhood withdrew its appeal with the acquiescence of the other parties.

10. During the pendency of the proceeding in the Court of Appeals, the Brotherhood filed its application with the National Mediation Board ("NMB") for an interpretation of the collective bargaining it had with Capital. The Interpretation of the NMB is Exhibit B to the Complaint herein.

11. The opposition of the Brotherhood to United's original policy of integration, and its continued opposition since then, arises out of a historical difference in organization of certain categories of employees on United and Capital. Since 1947, the Brotherhood had represented a group of employees at Capital pursuant to a National Mediation Board election known as the clerical, office, stores, fleet and passenger service employees. Immediately prior to the merger there were approximately 2,700 Capital employees in this group covered by collective bargaining agreement between Brotherhood and Capital. The same classifications of employees at United, however, have not been organized [fol. 49] into a single grouping. In fact, in 1945 the National Mediation Board conducted an election at United

in which it treated as two separate crafts or classes of employees for bargaining under the Railway Labor Act the cargo clerks and handlers, and the stockroom attendants. Each of these classifications at United was part of the classification at Capital represented by the Brotherhood. At United these two separate groups have been represented since 1948 by the International Association of Machinists ("IAM"). The cargo clerks and handlers are now known as ramp employees, and the stockroom attendants are known as stores employees. These two separate groups are now under a single agreement which United maintains with the IAM, known as the "Ramp and Stores Agreement." A copy of the current Ramp and Stores Agreement is attached hereto as Exhibit 3.

12. There were at United immediately prior to the merger approximately 10,000 employees in the grouping comparable to that containing the approximately 2,700 employees at Capital represented by the Brotherhood. Of these 10,000 employees at United, approximately 2,200 are represented by the IAM under the Ramp and Stores Agreement. The remaining 7,800 employees are covered under United's personnel regulations and are not represented by a labor organization.

13. Upon the effectuation of the merger, the former Capital employees performing the work covered under the United-IAM Ramp and Stores Agreement came under that Agreement. Approximately 530 of the 2,700 former Capital employees who were represented by the Brotherhood while at Capital are now represented by the IAM at United. Letters of Agreement have been entered into between United and the IAM relating to the integration of [fol. 50] the Ramp and Stores employees of United and Capital. A copy of these Letters is attached hereto as Exhibit 4. Brotherhood was invited to participate in the negotiations concerning the seniority integration of these employees but declined the invitation.

14. The 2,700 former Capital employees for whom the Brotherhood is here seeking representation rights have been completely integrated into United's system. They are working side by side with other United employees in the

same job classifications. They are receiving the same rates of pay and benefits and are subject to the same working conditions as all other United employees in comparable jobs. Those subject to the IAM Ramp and Stores Agreement are subject to the terms and conditions of that Agreement. Those who are now part of United's unorganized group are under United's uniform personnel regulations as are other unorganized United employees.

15. United's personnel regulations, which are now applicable to the approximately 2,170 former Capital employees who were formerly represented by the Brotherhood when they were Capital employees, provide overall wages and benefits which are more beneficial to these employees than those provided in the Capital-Brotherhood agreement. For example, the wage scale for Ticket Sales Agent at United ranges from $350 to $455, and at Capital under the Brotherhood agreement from $318 to $418; the maximum vacation for these employees while employed by Capital under the Brotherhood agreement was 3 weeks per year after 12 years of service, a level reached after 10 years at United where the maximum vacation is 20 working days per year; while at Capital the employee paid for [fol. 51] the entire cost of his uniform, whereas United pays one-half of the initial cost; United offers a stock purchase plan in which it matches 15% of the employee contributions—Capital had no such plan; United pays one-half of the cost of accident and sickness insurance for these employees—Capital paid none; these employees receive $5,000 of free group life insurance from United, and the option to purchase additional life insurance up to $10,000—Capital provided no free life insurance, but an option to purchase up to $7,000 of such insurance; these employees are eligible to participate in United's retirement income plan, which provides greater retirement benefits than were available to them at Capital.

16. The former Capital employees who are now subject to United's personnel regulations have been given full seniority credit for all prior service with Capital. United has established a grievance program for these employees

with ultimate review by W. A. Patterson, United's President.

17. The labor protective provisions imposed by the CAB as a condition of its approval of the merger provide additional protection to the rights of all employees of both Capital and United. These provisions require United to maintain compensation levels for at least four years. Reimbursement for expenses incident to transfers as a result of the merger are provided. Section 13 of the labor protective provisions provide arbitration machinery to resolve disputes arising with respect to the protection provided. The CAB order approving the merger reserves jurisdiction to amend, modify or add to the labor protective pro- [fol. 52] visions (see Exhibit 2 to this Affidavit.)

18. The Brotherhood has been engaged, since prior to the merger, in an organizing campaign in an effort to gain representation rights for the entire group of employees at United in the classifications which Brotherhood formerly represented at Capital. The various legal proceedings which Brotherhood has instituted before the CAB, NMB, Court of Appeals and this Court in an effort to impose upon United a collective bargaining agreement which it had with Capital (and which would provide less favorable benefits than the employees now enjoy) have been utilized by the Brotherhood as part of its organization campaign. The most recent example of this is the attached Exhibit 5, describing the filing of the suit herein, which was distributed to United employees recently.

19. Aside from the obvious disadvantages to the employees involved, the imposition of the Capital-Brotherhood agreement on United would require United to deal with a labor organization for a minority of a craft or class, contrary to the requirements of the Railway Labor Act. The minority group of 2,700 employees is now geographically distributed throughout United's system and is completely integrated with United's 10,000 employees in comparable classifications. These employees are no longer separately identifiable, and their only distinction is that they formerly worked for Capital. In addition, the imposition of this agreement on United would create a jurisdictional

conflict between the IAM under the Ramp and Stores Agreement and the Brotherhood respecting the approximately 530 former Capital employees previously under the Brotherhood-Capital agreement and now represented by the IAM.

[fol. 53] CHARLES M. MASON

Subscribed and Sworn to before me this 20th day of December, 1961.

Catherine A. Vita, Notary Public.

(Seal)

EXHIBIT 1 TO AFFIDAVIT OF CHARLES M. MASON

NOTICE TO ALL EMPLOYEES
of
UNITED AIR LINES
and
CAPITAL AIRLINES

This is a joint notice to all employees of Capital Airlines and United Air Lines that on June 1, 1961, the two carriers intend to effectuate their merger as approved by the Civil Aeronautics Board (by its Order issued on April 3, 1961 in the United-Capital Merger Case). Accordingly, on the effective date of the merger, June 1, 1961, Capital Airlines, Inc. will cease to exist, United Air Lines, Inc. will be the surviving carrier, and the employees of Capital Airlines will become employees of United Air Lines and their classifications, rates of pay, rules and working conditions will be in accordance with the applicable working agreements between United Air Lines and the various labor organizations listed below or by Company regulations, except as otherwise agreed to by United Air Lines, Inc. and the representatives of its employees. In addition the labor protective provisions of the Civil Aeronautics Board will be applicable.

Written notices of more detailed changes to be effected by the merger as provided in the Board's Order will be forthcoming as more specific plans of the merged operation are developed. Such notices will be posted at all locations where employees affected by the intended changes are located and copies sent to the authorized representatives of the employees.

The following working Agreements presently are in effect [fol. 54] between United Air Lines and the labor organizations listed below:

Organization	*Agreement*
Air Line Dispatchers Association	1960-61 Dispatchers' Agreement
Air Line Employees Association, Int'l.	1960-61 Link Trainer Operators' and Flight Simulator Operators' Agreement
Air Line Pilots Association, Int'l.	1959 Pilots' Agreement
Air Line Stewards and Stewardesses Association, International	1957-59 Agreement
Communication Workers of America	1958-61 Agreement
International Association of Machinists	1961-62 Dining Service Agreement
" " " "	1961-62 Mechanics' Agreement
" " " "	1961-62 Ramp and Stores Agreement
" " " "	1961-62 Guards' Agreement
Society of Air Line Meteorologists	1959-61 Meteorologists' Agreement
Transport Workers Union of America, AFL-CIO	1959-61 Flight Navigators' Agreement
UNA Chapter, Flight Engineers' International Association, AFL-CIO	1958 Flight Engineers' Agreement

Job classifications, rates of pay, rules and working conditions of all employees of United Air Lines not covered by the foregoing working agreements are established by Company regulations of United Air Lines.

This notice is given jointly by Capital Airlines, Inc. and United Air Lines, Inc. in accordance with Section 11 of the Labor Protective Provisions set forth in the Order issued April 3, 1961 by the Civil Aeronautics Board in the United-Capital Merger Case.

CAPITAL AIRLINES, INC.	UNITED AIR LINES, INC.
/s/ David H. Baker	/s/ W. A. Patterson
David H. Baker, President	W. A. Patterson, President

Dated and posted April 15, 1961 on bulletin boards or other conspicuous places convenient to employees of Capital Airlines and United Air Lines. Copies sent by registered mail to all authorized representatives of any of the employees of both carriers.

[fol. 55]

EXHIBIT 2 TO AFFIDAVIT OF CHARLES M. MASON

Order No. E-[illegible]605

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 3rd day of April, 1961

Docket 11699

In the matter of the

UNITED-CAPITAL MERGER CASE

ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That, subject to the conditions specified below, the merger of United Air Lines, Inc., and Capital Airlines, Inc., pursuant to joint application in Docket 11699, be and hereby is approved under section 408 of the Act:

2. That the approval granted herein is subject to the following conditions:

(a) That in accounting for the merger transaction the assets and liabilities shall be transferred to United at the values shown on the books of Capital as of the effective

date of the merger as defined in the merger agreement, with any differences between such book value and the purchase price to be entered in the acquisition adjustment account and held in suspense until all adjustments have been made for items not directly a part of the acquisition adjustment account, such as the recognition of income tax deferred through accelerated amortization of aircraft by Capital, merger integration costs, and other items of a capital nature; that the remainder in the acquisition adjustment account shall be amortized through income over the remaining life of the flight equipment acquired and the amounts so amortized in each quarterly accounting period shall be separately disclosed on CAB Form 41 reports; that any income tax loss carry-forward credit [fol. 56] resulting from the merger shall be taken up only in the periods in which realized; and that a plan of accounting for the foregoing items shall be submitted to the Board's Office of Carrier Accounts and Statistics for prior approval;

(b) That for rate-making or other regulatory purposes the approval granted herein shall not in any manner be relied upon by United as a basis for augmenting the investment value of assets acquired or as a basis for claiming an investment value in excess of the price paid for assets acquired nor shall such approval be deemed a determination for rate-making or other regulatory purposes of the fairness or reasonableness of any costs or charges claimed by Capital or United under the proposed merger;

(c) That, except as noted below, United shall be subject to the labor protective provisions set forth in the appendix to this order.

(d) That United shall not (i) serve Harrisburg, Pa., on Route 51; (ii) serve between Philadelphia, Pa., and Pittsburgh, Pa., except on flights which originate or terminate at Omaha, Nebr., or a point west thereof; and (iii) operate single-plane service between Buffalo, N. Y., and Detroit, Mich;

3. That at such time as United submits to the Board a statement indicating its full acceptance of the conditions

imposed by paragraph 2 above, and makes an appropriate showing that all necessary steps have been completed for the consummation of the aforementioned merger agreement, the certificates of public convenience and necessity held by Capital for Routes 14, 34, and 51 will be transferred to United by appropriate Board order, subject to a stay of the certificated authorizations for Routes 14 and 51 as described in paragraph 2(d) above;

4. That jurisdiction is hereby reserved to make such amendments, modifications, and additions to the protective labor conditions imposed by paragraph 2(c) above as circumstances may require.

By the Civil Aeronautics Board:

/s/ James L. Deegan

James L. Deegan
Acting Secretary

(SEAL)

[fol. 57]

APPENDIX A TO ORDER

Labor Protective Provisions

Section 1. The fundamental scope and purpose of the conditions specified in paragraph 2(c) of this order are to provide for compensatory allowances to employees who may be affected by the proposed merger of United and Capital approved by this order, and it is the intent that such conditions are to be restricted to those changes in employment solely due to and resulting from such merger. Fluctuations, rises and falls, and changes in volume or character of employment brought about solely by other causes are not covered by or intended to be covered by this order.

Section 2(a). The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein refers to either United or Capital or to the corporation surviving after consummation of the proposed merger of the two companies.

(c) The term "effective date of merger" as used herein shall mean the effective date of the amended certificates of public convenience and necessity transferred to United pursuant to the approval granted in this order.

(d) The term "employee" as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Section 4(a). Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the merger who is continued in service shall as a result of the merger be placed in a worse position with respect to compensation than he occupied immediately prior to the effective date of such merger so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules, and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him immediately prior to such date, except however, that if he fails to exercise his seniority rights to secure another available position, [fol. 58] which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which

shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee; and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

(d) The protection afforded herein shall only apply to displacements occurring within a period of three years from the effective date of the merger (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of four years from the date on which the employee is displaced.

Section 5(a). Any employee of either of the carriers participating in the merger who is deprived of employment as a result of said merger shall be accorded an allowance (hereinafter termed a dismissal allowance), based on length of service, which (except in the case of an employee with less than one year of service) shall be a monthly allowance equivalent in each instance to sixty percent (60%) of the average monthly compensation of the employee in question during the last twelve months of his

employment in which he earned compensation prior to the date he is first deprived of employment as a result of the [fol. 59] merger. This dismissal allowance will be made to each eligible employee, while unemployed, by United during a period beginning at the date he is first deprived of employment as a result of the merger and extending in each instance for a length of time determined and limited by the following schedule:

Length of Service	*Period of Payment*
1 year and less than 2 years	6 months
2 years " " " 3 years	12 months
3 years " " " 5 years	18 months
5 years " " " 10 years	36 months
10 years " " " 15 years	48 months
15 years and over	60 months

In the case of an employee with less than one year of service such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by Section 7.

(b) For the purposes of this order, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: *Provided,* That in calculating the dismissal allowance for such an employee, such allowance shall be based upon the compensation paid such employee by the carrier during his last twelve (12) months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c) An employee shall not be regarded as deprived of employment in case of his resignation, death, or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of the merger who is not deprived of his employment within three years from the effective date of said merger.

(d) Each employee receiving a dismissal allowance shall [fol. 60] keep United informed of his address and the name and address of any other person by whom he may be regularly employed.

(e) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f) An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g) If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he

shall be entitled to protection in accordance with the provisions of Section 4.

(h) If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: *Provided,* That this shall not apply to employees with less than one year's service.

(i) A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of:

1. Failure without good cause to return to service after being notified of position for which he is eligible and as provided in paragraphs (f) and (g).
2. Resignation.

[fol. 61]

3. Death.
4. Retirement or on account of age or disability in accordance with the current rules and practices applicable to employees generally.
5. Dismissal for justifiable cause.

Section 6. An employee affected by the merger shall not during the applicable protective period be deprived of benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 7. Any employee eligible to receive a dismissal allowance under Section 5 hereof may, at his option at the time of merger, resign and (in lieu of all other benefits and protections provided in this order) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of Service	*Separation Allowance*
1 year and less than 2 years	3 months' pay
2 years " " " 3 years	6 months' pay
3 years " " " 5 years	9 months' pay
5 years and over	12 months' pay

In the case of employees with less than one year's service, five days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in Section 5.

(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to time of the merger.

Section 8(a). Any employee who is retained in the service of the carrier surviving the merger (or who is later restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger, and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such trans- [fol. 62] fer, and for a reasonable time thereafter (not to exceed two working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred within three years from the effective date of the merger, and the claim must be submitted within ninety (90) days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the merger and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 9(a). The following provisions shall apply, to the extent they are applicable in each instance, to any

employee who is retained in the service of the carriers involved in this merger (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the merger to be unaffected thereby: *Provided, however,* That if the home is not sold within a substantial period of time after the merger, then the fair value of the home shall be determined as of a date as closely related to the date of sale as possible, with an agreed-upon adjustment being made to exclude any effect of the merger on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

[fol. 63] (b) Changes in place of residence subsequent to the initial change caused by the merger and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within three years after the effective date of the merger.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and, in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier, respectively; these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 10. If either carrier, on or after July 19, 1960, shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this order as an employee immediately affected by the merger, the provisions of this order shall apply to such an employee as of the date when he is so affected.

Section 11. United and Capital shall jointly or severally give at least forty-five (45) days' written notice containing a full and adequate statement of the proposed changes to be effected by the merger, including an estimate of the number of employees of each class, craft, or field of endeavor affected by the intended changes. Such notice shall be posted on bulletin boards or other conspicuous places convenient to the employees of said carriers, and a copy of the notice shall be sent by registered mail to all authorized representatives of any of the employees of both carriers.

[fol. 64] If requested in writing by any employee or employees of either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the merger shall be agreed upon within ten (10) days after such request is received by the carrier. The meeting shall commence within thirty (30) days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with Section 13.

Section 12. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order, be required to accept employment with the surviving carrier that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date of this order.

Section 13. In the event that any dispute or controversy (except as to matters arising under Section 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within thirty days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees.

[fol. 65]

EXHIBIT 3 TO AFFIDAVIT OF CHARLES M. MASON

1961-62

AGREEMENT

between

UNITED AIR LINES, INC.

and

THE INTERNATIONAL ASSOCIATION OF MACHINISTS

RAMP AND STORES AGREEMENT

[fol. 65]

EXHIBIT 3 TO AFFIDAVIT OF CHARLES M. MASON

[fol. 66]

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Legend:

Indicates paragraph revision as result of last negotiations

[fol. 67]

AGREEMENT

Between

UNITED AIR LINES, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS

This Agreement is made and entered into in accordance with the provisions of Title II of the Railway Labor Act, as amended, by and between United Air Lines, Inc. hereinafter referred to as the 'Company', and International Association of Machinists, hereinafter referred to as the 'Union'. (For purposes of identification, this Agreement shall be known as 'Ramp and Stores Agreement').

ARTICLE I

PURPOSE OF AGREEMENT

A. The purpose of this Agreement is, in the mutual interest of the Company and of the employees, to provide for the operation of the services of the Company under methods which will further, to the fullest extent possible, the safety of air transportation, the efficiency of operation, and the continuation of employment under conditions of reasonable hours, proper compensation, and reasonable working conditions. It is recognized by this Agreement to be the duty of the Company and of the employees to cooperate fully, both individually and collectively, for the advancement of that purpose.

B. No employee covered by this Agreement will be interfered with, restrained, coerced, or discriminated against by the Company, its officers or agents, because of membership in or lawful activity on behalf of the Union.

C. It is understood wherever in this Agreement em-
[fol. 68] ployees or jobs are referred to in the masculine gender, it shall be recognized as referring to both male and female employees.

ARTICLE II

SCOPE OF AGREEMENT

A. The company hereby recognizes the Union as the sole and exclusive bargaining agent for all classes and grades of Ramp Servicemen, Storekeeper, and Station Wagon Drivers employed by the Company, the Union having submitted satisfactory evidence to the Company on March 25, 1948 that a majority of such employees (formerly known as Cargomen-A, Cargomen-B, Lead Cargomen, Transportation Service Agents, Cabin Supplymen, Cabin Servicemen, Lead Cabin Supplymen, Lead Cabin Servicemen, Cabin Cleaners, Storekeepers, Stock Clerks, Lead Storekeepers, Warehousemen, Truck Drivers, and Station Wagon Drivers,) has designated the Union to represent them.

B. The Company's General Policy, Operating and other applicable Regulations shall be available to all employees at all points, and employees covered by this Agreement shall be governed by such Regulations and by all applicable rules, regulations and orders issued by properly designated authorities of the Company not in conflict with the terms of this Agreement. In addition, the Company shall cause to be compiled and issued to each present and new employee, a convenient sized book containing all applicable rules, regulations, and orders and shall furnish each employee with amendments or changes from time to time as amendments or changes are made. This book of rules shall be supplementary to, but shall not supersede the aforementioned regulations.

C. All work performed by the Company involving the work of all classes and grades of Ramp Servicemen, Storekeepers, and Station Wagon Drivers as described in the Work Classifications in Article IV of this Agreement, is recognized as coming within the jurisdiction of the International Association of Machinists and is covered by this Agreement. However, the provisions of this Agreement shall not be applied to Ramp Service work at other locations on the Company's system where such work is performed by employees classified in the composite job known as Station Agent which also includes some or all of the duties necessary

[fol. 69] to be performed in connection with communications, radio, ticket selling and other related station or office clerical work. The stations where Ramp Servicemen who are covered by this Agreement are located on the date of this agreement or will be located are: Boston, New York, Newark, Washington, Cleveland, Chicago, Omaha, Denver, Salt Lake, Los Angeles, Burbank, San Francisco, Oakland, Portland, Seattle, Detroit, and Philadelphia. The Company will not eliminate the classification of Ramp Servicemen at any station listed above without negotiating with the Union. It is further understood that at any time the Company finds it necessary to place additional stations on a comparable basis as those listed above, employees performing Ramp Service work exclusively shall be classified as Ramp Servicemen and the provisions of this Agreement shall apply. It is understood that the Company reserves the right to continue to contract out the types of work heretofore customarily contracted out or to contract out any work when its facilities or personnel are not sufficient or available. The Company reserves the right to contract out other work but if such work comes within the scope of this Agreement, notice will be served on the Union before such contracting takes place. After receipt of notice by the Union of intent to contract out such work, if such contracting indicates that any employee covered by this Agreement will be reduced, laid-off or transferred as a result, either party to this Agreement may serve notice of a desire to negotiate for the procedure to be followed and the protection to be afforded employees involved. Actual negotiations under this provision will be initiated within ten (10) days from receipt of a notice of desire to negotiate the matter and no employee effected will be reduced, laid-off or transferred in less than forty (40) days after receipt of such notice.

ARTICLE III

STATUS OF AGREEMENT

A. It is expressly understood and agreed that when this Agreement is accepted by the parties and signed by their authorized representatives, it will supersede any and all Agreements existing or previously executed between the

Company and any Union or individual affecting the craft or class of employees covered by this Agreement.

[fol. 70] B. It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for the protection of employee seniority and other property rights.

* * * * * * *

[fol. 71]

ARTICLE XV

BARGAINING AND GRIEVANCE PROCEDURE

A. In order to properly administer this Agreement and to dispose of all disputes or grievances which may arise under this Agreement or between the parties, the following procedure shall be followed:

[fol. 72] 1. The Union will be represented by not more than one (1) properly designated steward for each storeroom, warehouse, service station or subdivision thereof at each point on the System for each shift.

2. The Union will be further represented at each point where local lodges exist by a Local Committee, consisting of three (3) members elected by the local membership and in dealing with general officials of the Company by a System General Chairman and Executive Committee.

3. The Company will designate the representatives at each location where persons covered by this Agreement are employed who are empowered to settle all local grievances not involving change in Company policy, or interpretations, or changes in the intent and purpose of this Agreement.

4. The Union and Company will, at all times, keep the other party advised through written notice of any change in authorized representatives.

5. The System General Chairman of the Union shall be permitted, at any time, to enter facilities of the Company for the purpose of investigating grievances and disputes arising under this Agreement after contacting the Company officer in charge and advising him of the purpose of the visit.

B. For the presentation and adjustment of disputes or grievances that may arise, the procedure will be:

1. Any employee having a complaint or grievance in connection with the terms of employment or working conditions, may present his complaint or grievance to the steward of the Union, who in turn will discuss the matter with the employee's immediate supervisor and endeavor to arrive at a satisfactory adjustment of same.

2. If the steward or employee is not satisfied with the decision of the employee's immediate supervisor, the matter will be referred to the local Union committee in writing on a standard grievance form. The [fol. 73] local committee will then take the matter up with the official in charge at the Base or Station for adjustment, furnishing four (4) copies of the signed complaint to the Company representative, two (2) to be retained by the Company and two (2) to be returned to the Union representatives with the written decision.

3. If not then satisfactorily settled, the local committee and System General Chairman may appeal for consideration and decision to the employee's system Department Head or his designee.

4. If the local committee and System Chairman are dissatisfied with the decision of the official designated in paragraph 3. above, the matter may be appealed to the Chief Operating Officer of the Company or his designee. Further appeal, if desired, shall be to the System Board of Adjustment provided for in ARTICLE XVI of this Agreement.

5. In step number one (1), the employee's immediate supervisor will give his decision as soon as possible but not to exceed twenty-four (24) hours after discussion of the issue. If, as a result of his decision the Union decides to appeal, notice of such appeal accompanied by the standard grievance form must be given the official in charge at the location within ten (10) days of the date of the decision rendered in step number one (1), and the actual appeal must be perfected and submitted within thirty (30) days. After actual presentation of the issue, and final and oral discussion between representatives of the Company and Union, a written decision on the standard grievance form will be issued to the Union as soon as possible, but not to exceed seventy-two (72) hours after the final discussion. Appeals to the third and fourth step of the grievance procedure outlined above shall conform to the time limitations set forth for appeals to step number two (2) and Company representatives shall issue their decisions in writing on the standard grievance form as soon as possible, but not to exceed five (5) and ten (10) days respectively in steps number three (3) and four (4) after the final presentation. [fol. 74] 6. If not satisfactorily settled at the fourth step further appeal, if desired, shall be to the System Board of Adjustment as provided for in Article XVI of this Agreement.

C. Grievances involving wage claims must be filed promptly after the cause giving rise to the grievance is evident and wage claims will not be valid and collectible for a period earlier than thirty (30) days prior to the date of filing a grievance or the date the grievance arose, whichever is most recent.

D. Stewards and local Union Committeemen will be permitted, after reporting to their Supervisor, a reasonable amount of time during working hours to investigate or present grievances. In the event it is necessary to go to another work area they will report in with the Supervisor of the other work area. The Company will allow straight time

compensation for such investigation and presentations during working hours. The local Committeemen at the Maintenance Base will be allowed a reasonable amount of time for this purpose. Stewards and other local Committeemen will be allowed to a maximum of five (5) hours in any one (1) week for this purpose. Local Committeemen at the major line stations and at the Maintenance Base, notwithstanding the reference to shift assignments in Article IX, Paragraph B, will be assigned to the day shift if requested by the Union.

E. Necessary hearings and investigations called by the Company shall, insofar as possible, be conducted during regular business hours and all stewards, local committeemen and witnesses necessary for a proper hearing or investigation will be compensated at straight-time rate for all time spent attending such hearing or investigation.

F. No employee covered by this Agreement shall be discharged or suspended from the service without a prompt, fair and impartial investigation and may be represented and assisted at such investigation by Union representatives. At least forty-eight (48) hours prior to such investigation the employee and the Union shall be advised in writing of the precise charges against the employee. Nothing herein shall be construed as preventing the Company from holding an employee out of service pending such investigation.

[fol. 75] G. Any employee dissatisfied with the action of the Company in suspending or discharging him, may appeal from such action by filing an appeal to the third step of the grievance procedure as provided for in this Agreement and a hearing shall be held within ten (10) days of perfecting such appeal. Oral and written evidence may be introduced at such hearings and witnesses may be required to testify under oath. All decisions by Company representatives and all appeals filed by the employee or Union shall be in writing and shall conform to the time limitations set forth in the third and fourth steps of the grievance procedure.

H. If, as a result of any hearing or appeals therefrom, it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and

made whole for any loss of pay he suffered by reason of his suspension or discharge, and his personnel records shall be corrected and cleared of such charge; or, if a suspension rather than discharge results, the employee shall have that time he has been held out of service credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the maximum liability of the Company shall be limited to the amount of normal wages he would have earned in the service of the Company had he not been discharged or suspended.

I. When it is mutually agreed that a stenographic report is to be taken by a public stenographer of any investigation or hearing provided for in this Agreement, the cost will be borne equally by both parties to the dispute. When it is not mutually agreed that a stenographic report of the proceedings be taken by a public stenographer, the stenographic record of any such investigation or hearing may be taken by either of the parties to the dispute. A copy of such stenographic record will be furnished to the other party to the dispute upon request at pro-rata cost. The cost of any additional copies requested by either party shall be borne by the party requesting them, whether the stenographic record is taken by mutual agreement or otherwise.

J. No steward or local committee member shall serve in such capacity while he is on leave of absence.

K. Any grievance which the Company may have against [fol. 76] the Union at any place on the System shall be presented by the Company's Chief Operating officer or his designee to the System Chairman. In the event the matter is not satisfactorily adjusted within two (2) weeks after such presentation it may be appealed to the System Board of Adjustment provided for herein.

L. All time limits for appeals and decisions shall be exclusive of Saturdays, Sundays, and Holidays.

ARTICLE XVI

SYSTEM BOARD OF ADJUSTMENT

A. In compliance with Section 204, Title II of the Railway Labor Act as amended, there is hereby established a System Board of Adjustment for the purpose of adjusting disputes or grievances which may arise under the terms of this Agreement and which are properly submitted to it after all steps for settling disputes and grievances as set forth in Article XV have been exhausted.

B. The System Board of Adjustment shall consist of three (3) members, one (1) appointed by the Company (hereinafter referred to as the Company Member), one (1) appointed by the Union (hereinafter referred to as the Union Member) and for each dispute one (1) member selected from a panel of potential referees in a manner agreeable to the Company and the Union (hereinafter referred to as the Neutral Member). The Company Member and the Union Member shall serve until their successors are duly appointed.

C. The Board shall have exclusive jurisdiction over disputes between any employee covered by this Agreement and the Company and between the Company and the Union, growing out of grievances concerning disciplinary action, rules, rates of pay or working conditions covered by this Agreement, or any amendment or supplement thereto, or out of the interpretation or application of any terms of this Agreement or any amendment or supplement thereto. The jurisdiction of the Board shall not extend to proposed changes in rules, basic rates of compensation, or working conditions covered by this Agreement or any amendments thereto. The Board shall not have jurisdiction or power to add to or subtract from this Agreement or any amendments thereto or any agreement between the parties.

[fol. 77] D. The Board shall consider any dispute properly submitted to it by any employee covered by this Agreement, by the System General Chairman of the Union or by the chief operating officer of the Company when such dispute has not been previously settled in accordance with the

terms provided for in this Agreement, provided that the dispute is filed with the Board within forty (40) calendar days after the procedure provided for in this Agreement has been exhausted. If a dispute is not filed within such time the action of the Company or Union shall become final and binding. The date the Submission is received by the Board shall determine the order of hearing, unless the parties mutually agree otherwise.

E. The Neutral Member of the Board shall preside at meetings and hearings of the Board and shall be designated as Chairman of the System Board of Adjustment. It shall be the responsibility of the Chairman to guide the parties in the presentation of testimony, exhibits, and argument at hearings to the end that a fair, prompt and orderly hearing of the dispute is afforded.

F. The Board shall meet in the City where the General Offices of United Air Lines, Inc. are maintained (unless a different place of meeting is agreed upon by the parties, with the consent of the Neutral).

G. All disputes properly referred to the Board for consideration shall be addressed to the Company Member and the Union Member, jointly. The Submission of the dispute to the Board shall include:

1. The question or questions at issue.

2. A statement of the specific Agreement provisions which are claimed to have been violated.

3. A statement of all facts relating to the dispute which the appealing party asserts exist and alleges can be proved and which support its position.

4. The full position of the appealing party.

A copy of the initial Submission shall be served on the other party or parties.

[fol. 78] H. Upon the filing of the Submission with the Company Member and the Union Member, the Company and the Union shall within five (5) days select a Neutral Member to sit with the Board in the consideration and disposition of the case and shall advise the appealing party and

interested parties of the name and address of the Neutral Member.

I. Within thirty (30) days after receipt of the appealing party's Submission, the other party to the dispute shall file a Statement of Position with the Company Member, the Union Member, and the party or parties which shall include:

1. If the parties are unable to agree on the question or questions at issue, the other party will state the question or questions at issue.

2. All facts relating to the dispute which the party asserts exist and alleges can be proved and which support its position.

3. The party's full position.

J. Upon the filing of the Statement of Position, the appealing party shall forward a copy of the Submission to the Neutral Member and the other party to the dispute shall file with the Neutral Member a copy of the Statement of Position. All subsequent documents to be filed with the Board shall be addressed to all three members of the Board.

K. Within fifteen (15) days after the date the Statement of Position is filed with the Company Member and the Union Member, the parties shall advise the Board the facts on which they desire to present evidence during the hearing of the dispute before the Board unless they mutually agree not to present any evidence or oral argument. Each party shall have the opportunity at the hearing to present evidence on the facts on which the other party presents evidence. The Neutral Member may also advise the parties the facts on which he desires to have evidence. If any party does not desire to present evidence or oral argument, that party shall so advise the other party or parties and the Board within the time limits specified in this paragraph.

L. 1. As soon as the parties and the Neutral Member (Chairman) have been advised of the facts on which [fol. 79] evidence will be presented, the Chairman shall set a date for hearing which shall be mutually satisfactory with the Union and Company Members

of the Board and shall be within thirty (30) days of said date, unless the Chairman is notified that the Company and the Union have agreed to a mutually satisfactory later date. The Chairman shall give the necessary notices in writing of such hearing to the parties. The decision of the Board shall be rendered within thirty (30) days after the close of the hearing. If neither party or the Chairman requests evidence to be presented at the hearing, hearing shall be waived except where any of the parties or the Chairman request a hearing for the purpose of oral argument.

2. In the event neither party desires to present evidence or oral argument at a hearing, the Chairman shall be so advised within the time limits specified in Paragraph K of this Article. If there is to be no hearing for presentation of evidence or oral argument, the Chairman shall set a date for an executive session of the Board during or after which a decision shall be rendered, but in any event said decision shall be rendered within forty (40) days of the date the Chairman was advised that no evidence or oral argument would be presented.

M. Employees covered by this Agreement may be represented at Board hearings by such person or persons as they may choose and designate and the Company may be represented by such person or persons as it may choose and designate. Evidence may be presented either orally or in writing, or both. All witnesses testifying orally or by deposition shall do so under oath.

On request of individual members of the Board, the Board may, by majority vote, or shall at the request of either the Union Member or the Company Member thereon, summon any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute, or by either party, or by the Board itself.

The number of employee witnesses summoned at any one time shall not be greater than the number which can be [fol. 80] spared from the operation without interference with the services of the Company.

N. A majority vote of all members of the Board shall be competent to make a decision.

O. Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties to this dispute and the parties to this Agreement.

P. Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the Company, or to their duly accredited representatives, under the provisions of the Railway Labor Act, as amended.

Q. Each of the parties hereto will assume the compensation, travel expense and other expenses of the Board Members selected by it and one-half of the compensation, travel expense and other expenses of the Neutral Member.

R. Each of the parties hereto will assume the compensation, travel expense and other expenses of the witnesses called or summoned by it. Witnesses who are employees of the Company shall receive free contingent air transportation over the lines of the Company from the point of duty or assignment to the point at which they must appear as witnesses and return, to the extent permitted by law.

S. The Company Member and the Union Member, acting jointly, shall have the authority to incur such other expenses as in their judgment may be deemed necessary for the proper conduct of the business of the Board, and such expenses shall be borne one-half by each of the parties hereto. Board Members who are employees of the Company shall be granted necessary leaves of absence for the performance of their duties as Board Members. So far as space is available, the Company and the Union Board Members shall be furnished free transportation over the lines of the Company for the purpose of attending meetings of the Board, to the extent permitted by law.

T. It is understood and agreed that each and every Board Member shall be free to discharge his duty in an independent manner, without fear that his individual relations [fol. 81] with the Company or with the Union may be affected in any manner by any action taken by him in good faith in his capacity as a Board Member.

U. A stenographic report will be made on each case on which a hearing is held unless the parties mutually agree otherwise.

V. The Chairman's copy of all transcripts and/or all records of cases will be filed at the conclusion of each case in a place to be provided by the Company, and will be accessible to Board Members and to the parties.

[fol. 82]

ARTICLE XX

UNION SECURITY

A. Any employee in a classification covered by this Agreement on the effective date of this Article shall become a member of the Union within sixty (60) days after the effec-
[fol. 83] tive date of this Article and shall be required as a condition of continued employment by the Company to maintain his membership in the Union so long as this Article remains in effect, to the extent of paying an initiation (or reinstatement) fee and monthly membership dues no greater than as hereinafter set forth. Such employee may have his monthly membership dues deducted from his earnings as provided in Paragraph L of this Article or he must pay his membership dues directly to the Financial Secretary of his local lodge. Initiation (or reinstatement) fees must be paid directly to the Financial Secretary of the employee's local lodge. The provisions of this paragraph shall not apply to such employee if employed on or before December 1, 1945 in a classification now covered by this Agreement and who was not a member of the Union on December 1, 1945 and who has not become a member since that date.

B. Any new employee covered by this Agreement who is hired on or after the effective date of this Article shall become a member of the Union within ninety (90) days after employment in a classification covered by this Agreement and shall be required as a condition of continued employment by the Company to maintain his membership in the Union so long as this Agreement remains in effect, to the extent of paying an initiation (or reinstatement) fee and monthly membership dues as hereinafter set forth.

C. Any employee maintaining, or maintaining and accruing, seniority under this Agreement (except as provided in Paragraph F of this Article) but not employed in a classification covered by this Agreement shall not be required to maintain Union membership during such employment but may do so at his option. Should such employee return to a classification covered by this Agreement, he shall be required to become a member of the Union within fifteen (15) days after the date he returns to such classification, and shall, as a condition of employment in classifications covered by this Agreement, become a member of the Union and maintain membership in the Union so long as this Article remains in effect, to the extent of paying an initiation (or reinstatement) fee and/or monthly membership dues.

D. The provisions of this Article shall not apply to any employee covered by this Agreement to whom membership in the Union is not available by payment of initiation (or reinstatement) fee, if applicable, and monthly dues, upon the same terms and conditions as are generally applicable to any [fol. 84] other employee of his classification at his point on the Company's system or in the local lodge on the Company's system to which assigned by the Union, or to any employee to whom membership in the Union is denied or terminated for any reason other than the failure of the employee to pay initiation (or reinstatement) fee, if applicable, and monthly dues. Nothing in this Article shall require the payment of an initiation (or reinstatement) fee by an employee if an authorized or permissible transfer according to the By-Laws or Constitution of the Union is involved.

E. If any employee covered by this Agreement has resigned from the Company and is reemployed he shall be governed by Paragraph A of this Article.

1. If any employee is laid off and is recalled from lay-off he shall be governed by Paragraph C of this Article.

2. The seniority status and rights of employees granted leaves of absence to serve in the Armed Forces shall not be terminated by reason of any of the provisions of this Article, but such employees shall upon

resumption of employment in classifications covered by this Agreement be governed by the provisions of Paragraph A of this Article.

F. The payment of membership dues shall not be required as a condition of employment during leave of absence without pay or during periods of transfer or promotion to a classification not covered by this Agreement, except employees given temporary transfers not to exceed six (6) months or any extension thereof as provided in Paragraph M of Article IX of this Agreement will be required to be a member of the Union and pay monthly dues during said temporary transfer as a condition of maintaining and accruing seniority under this Agreement.

G. Notwithstanding the provisions of Paragraph F of Article XV of this Agreement, when an employee does not become a member of the Union by payment of an initiation (or reinstatement) fee as provided in this Article or who is a member of the Union and becomes delinquent in the payment of monthly dues as provided in this Paragraph the following procedure shall apply:

1. Employee Who Does Not Become a Member of the Union:

[fol. 85] a. If a new employee has not become a member of the Union upon completion of seventy-five (75) days of service with the Company, the System General Chairman of the Union shall notify such employee in writing, registered mail, return receipt requested, copy to the employee's system Department Head, that such employee must become a member of the Union within the time limits specified in Paragraph B of this Article or be subject to discharge as an employee of the Company. If upon expiration of the period of time specified in Paragraph B of this Article such new employee has not become a member of the Union, the System General Chairman of the Union shall certify in writing to the employee's system Department Head, copy to the employee, that the employee has failed to become a member of the Union as provided in this Article and is, therefore to be

discharged. The employee's system Department Head or his designee shall then promptly notify the employee involved that he is to be discharged from the services of the Company, and shall promptly take proper steps to so discharge the employee.

b. If an employee other than a new employee who is required to become a member of the Union as provided in this Article does not become a member of the Union within the time limits specified in this Article for employees in his category covered by this Agreement, the System General Chairman of the Union shall notify the Company, copy to the employee that such employee has failed to become a member of the Union as required by this Article and is, therefore, to be discharged. Such employee's system Department Head or his designee shall then promptly notify the employee involved that he is to be discharged from the services of the Company and shall promptly take proper steps to discharge said employee.

2. Employee Delinquent in Payment of Monthly Membership Dues:

a. If an employee covered by this Agreement becomes delinquent by more than two (2) calendar months in the payment of monthly dues, the System [fol. 86] General Chairman of the Union shall notify the employee in writing, registered mail, return receipt requested, copy to the employee's system Department Head, that said employee is delinquent in the payment of monthly membership dues as specified herein and accordingly will be subject to discharge as an employee of the Company. Such letter shall also notify the employee that he must remit the required payment to the Financial Secretary of his local lodge by the twenty-second (22) day of the month in which notice from the System General Chairman is received or be subject to discharge. If such employee still remains delinquent in the payment of dues on the twenty-second (22) day of the month in which his

notice from the System General Chairman was received, the System General Chairman of the Union shall certify in writing to the employee's system Department head, copy to the employee, that them employee has failed to remit payment of dues within the grace period allowed herein and is, therefore, to be discharged. The employee's system Department Head or his designee shall then promptly notify the employee involved that he is to be discharged from the services of the Company and shall promptly take proper steps to so discharge the employee.

3. An employee discharged by the Company under the provisions of this Paragraph shall be deemed to have been discharged for cause within the meaning of the terms of this Agreement.

H. Any discharge under the terms of this Article shall be ased solely upon the failure of the employee to pay or ender initiation (or reinstatement) fee and/or membership nes upon the same terms and conditions as are generally pplicable to any other member of the Union in his classification of employment at his point on the Company's, ystem or local lodge on the Company's system to which ssigned by the Union within the time limits specified herein nd not because of denial or termination of membership in he Union for any other reason.

I. Notwithstanding the provisions of Article XV of this Agreement, a grievance by an employee who is to be discharged as the result of an interpretation or application of fol. 87] the provisions of this Article, shall be subject to he following procedure:

1. Such employee who believes that the provisions of this Article pertaining to him have not been properly interpreted or applied and who desires a review must submit his request for review in writing within five (5) days from the date of his notification by his System Department Head or designee as provided in Paragraph G, subparagraph 2, of this Article. The request will be submitted to the Chief Operating Offi-

cer of the appropriate administration with a copy to the System General Chairman of the Union. The System General Chairman of the Union or his designee may be present at the review of the grievance to represent the Union interest in the case. The Chief Operating Officer of the appropriate administration or his designee will review the grievance and render a decision in writing with a copy to the System General Chairman of the Union not later than ten (10) days following the receipt of the grievance.

2. The Chief Operating Officer of the appropriate administration or his designee will forward his decision to the employee with a copy to the System General Chairman. If the decision is not satisfactory to either the employee or the Union, then either may appeal the grievance directly to the System Board of Adjustment, established under Article XVI of this Agreement within fifteen (15) days from the date of the decision. The terms and provisions of such Article shall be applicable, except as otherwise specified herein.

3. During the period a grievance is filed under the provisions of this paragraph and until after decision by the Chief Operating Officer of the appropriate administration or his designee or after final decision by the System Board of Adjustment, if appeal is made to that Board, the employee shall not be discharged from the Company because of non-compliance with the terms and provisions of this Article.

4. Saturdays, Sundays and Holidays shall be excluded only from the time limits specified in this Paragraph I.

[fol. 88] J. No employee or employees covered by this agreement or an employee whose employment is terminated pursuant to the provisions of this Article or the Union shall have any claim for loss of time, wages or any other damages against the Company because of agreeing to this Article of this Agreement or because of any alleged violation, misapplication, compliance or non-compliance with any of the provisions of this Article. If notwithstanding the provisions of the first sentence of this paragraph a Board, Court or other competent authority shall in a particular

instance or case enter an award, decision or judgment monetary or otherwise against the Company because of agreeing to this Article of this Agreement or because of alleged violation, misapplication, compliance or non-compliance with any provision of this Article such award, decision or judgment shall be borne equally between the Company and the Union, except that the Union will completely indemnify the Company if such award, decision or judgment is entered against the Company because of the Company having agreed with the Union to include this Article in this Agreement.

K. During the life of this Agreement the Union agrees the maximum initiation (or reinstatement) fee shall be Twenty Dollars ($20.00) and the maximum membership dues for all classifications shall be Five Dollars ($5.00) per month.

DUES CHECK OFF

L. During the life of this Agreement the Company agrees to deduct from the pay of each member of the Union and remit to the Union 'standard' monthly membership dues uniformly levied in accordance with the constitution and by-laws of the Union as prescribed by the Railway Labor Act, as amended, provided such member of the Union voluntarily executes the agreed upon form, which is hereinafter included in this Agreement, to be known as 'check-off form', which shall be prepared and furnished by the Union. The Company will not be required to deduct monthly membership dues from the pay of employees covered by this Agreement unless the dues for the employee conform to one of the following:

1. 'Standard' dues for employees of his classification as designated by the Union for San Francisco - Oakland, even though these dues may be the same as those provided in sub-paragraph 2 next page.

[fol. 89] 2. 'Standard' dues for employees of his classification as designated by the Union for any or all other points on the Company's system.

3. All 'Standard' dues shall not exceed the maximums stipulated in Paragraph K of this Article.

* * * * * * *

[fol. 90]

EXHIBIT 4 TO AFFIDAVIT OF CHARLES M. MASON

UNITED

LETTERS OF AGREEMENT

COVERING INTEGRATION OF RAMP AND STORES EMPLOYEES

of

UNITED AIR LINES

and

CAPITAL AIRLINES

[fol. 91]

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[fol. 92]

LETTER BB

6/23/61

LETTER OF AGREEMENT

between

UNITED AIR LINES, INC.

and

THE INTERNATIONAL ASSOCIATION OF MACHINISTS

THIS LETTER OF AGREEMENT, made and entered into by and between UNITED AIR LINES, INC. (hereinafter referred to as "United") and the International Association of Machinists (hereinafter referred to as the "IAM").

WITNESSETH:

WHEREAS, on April 3, 1961, the Civil Aeronautics Board approved a merger of Capital Airlines, Inc. (Capital) into United Air Lines, Inc., and

WHEREAS, the Ramp and Stores employees of United are represented by the IAM and their rates of pay, seniority, rules and working conditions are governed by the 1961-62 Ramp and Stores Agreement between United and the IAM, and

WHEREAS, the employees performing ramp service and storekeeping work on Capital were part of the craft or class of clerical, office, stores, fleet and passenger service employees covered by an agreement between Capital and the Brotherhood of Railway Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the "BRC"), and

WHEREAS, Section 3 of the Labor Protective Provisions, imposed by the Civil Aeronautics Board as a condition of its approval of the United-Capital merger, requires that provisions be made for the integration of seniority lists in a

fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected, and

[fol. 93] WHEREAS, the merger of Capital into United became effective June 1, 1961, and

WHEREAS, representatives of the IAM and the BRC met with United on June 20, 1961, but the BRC refused to negotiate for the integration of the seniority lists of the afore-mentioned employees, and

WHEREAS, United and the IAM wish to provide for the integration of seniority lists of the Ramp and Stores employees of United and Capital in a fair and equitable manner in accordance with Section 3 of the Labor Protective Provisions attached to the Civil Aeronautics Board's Order of April 3, 1961.

NOW, THEREFORE, the parties have mutually agreed as follows:

A. *Definitions*

1. The seniority lists to be established for the purposes of seniority integration shall be lists of employees in the following classifications:

Lead Ramp Serviceman	Lead Storekeeper
Ramp Serviceman	Storekeeper

2. Such lists shall be point classification lists for all classifications listed in Item 1 above.

3. For each seniority classification to be integrated, a "common point" shall be a station under the UAL-IAM Ramp and Stores Agreement at which on June 1, 1961, at least one employee of each carrier doing work of that seniority classification was located.

4. For each seniority classification to be integrated, a "United point" shall be a station under the UAL-IAM Ramp and Stores Agreement at which on June 1, 1961, only United employees doing work of that seniority classification were located.

[fol. 94] 5. For each seniority classification to be integrated, a "Capital point" shall be a station under the UAL-IAM Ramp and Stores Agreement at which on June 1, 1961, only Capital employees doing work of that seniority classification were located.

6. "Employee" shall mean any person who, on June 1, 1961, was performing the work of a classification listed in Item 1 above or comparable work for a majority of his time.

7. "*Converted* point classification seniority date" shall be the date the employee began performing work of a classification listed in Item 1 above or comparable work for a majority of his time at any point on either system adopted as that employee's point classification seniority date.

8. "*Established* point classification seniority date" shall be the employee's established point classification seniority date for United employees hired under Ramp and Stores Agreement and, for all other employees, the date on which the employee began performing work of a classification listed in Item 1 above or comparable work for a majority of his time at the point on either system at which he was located on June 1, 1961.

B. *Seniority Integration*

1. All former employees of Capital Airlines at Buffalo, Atlanta, Milwaukee, Minneapolis, Pittsburgh, Detroit, Cleveland, Midway (Chicago), O'Hare (Chicago), Newark, Philadelphia, Baltimore, La Guardia (New York), Idlewild (New York), and Washington who on June 1, 1961, were performing the work described in Article IV, Paragraphs A and B, of the Ramp and Stores Agreement a majority of their time shall have seniority status as Lead Ramp Serviceman and/or Ramp Serviceman. Similarly, all former employees of Capital Airlines who on June 1, 1961, were performing the work

[fol. 95] described in Article IV, Paragraphs C and D, of the Ramp and Stores Agreement a majority of their time shall have seniority status as Lead Storekeeper and/or Storekeeper.

2. Effective June 1, 1961, the seniority list for each classification at a common point or at a United point shall be established by giving each employee his *established* point classification seniority date as his point classification seniority date.

3. Effective June 1, 1961, the seniority list for each classification at a Capital point shall be established by giving each employee as his point classification seniority date the seniority date he had in the position he occupied immediately prior to June 1, 1961. This seniority date shall be applicable as long as the employee remains at the point at which he was located on June 1, 1961.

4. Subsequent to June 1, 1961, employees transferred by the Company as a result of the merger or employees who transfer under any circumstances in which they carry point seniority with them to their new point shall establish at the point to which transferred their point classification seniority in their basic seniority classification and, when transferred in a premium classification, in the premium classification, as follows:

From	To	Point Classification Seniority Date
Common Point	Common Point	Established
	United Point	Established
	Capital Point	Converted
United Point	Common Point	Established
	United Point	Established
	Capital Point	Converted
Capital Point	Common Point	Established
	United Point	Established
	Capital Point	Converted

[fol. 96] *Exception*: If a former Capital Airlines employee is transferred to a Capital point as a result of the merger or under circumstances in which he carries point seniority with him, his seniority date at the new point shall be in accordance with Item B-3 above.

5. Subsequent to June 1, 1961, any employee who transfers by bid or in any other manner than that provided in Item 4 above shall have his point classification seniority date established in accordance with the UAL-IAM Ramp and Stores Agreement.

C. *Seniority Lists*

1. The integrated seniority lists of employees under the UAL-IAM Ramp and Stores Agreement shall be established by one (1) representative of the Union and one (1) representative of the Company in accordance with the provisions of this Letter of Agreement.

2. The Union and Company representatives shall be empowered to review the seniority lists which have been issued by United Air Lines and Capital Airlines and the company records of either carrier in the performance of its function.

3. When the seniority lists for each point are finally established in accordance with the provisions of this Letter of Agreement, the dates appearing thereon shall be presumed correct and the lists shall be published at the point in accordance with Article IX of the 1961-62 Ramp and Stores Agreement between the Company and the Union as of the effective date of the merger. Any protests of seniority dates appearing thereon must be submitted within thirty (30) days after the date the controversy arises, which shall be the date of publication of such lists, to the President and General Chairman of the Union, on the grievance form provided for in the UAL-IAM Ramp and Stores Agreement for the filing of second step grievances. The Presi-

[fol. 97] dent and General Chairman of the Union shall submit such protests for decision to the Negotiating Committee of the Union and the Company.

4. In the event the Negotiating Committees fail to agree on a decision on a seniority protest, the dispute may be submitted for adjustment to the UAL-IAM Merger Arbitration Committee within thirty (30) days of the date of failure to agree.

This Letter of Agreement shall be effective on the date of signing and shall remain in full force and effect for a period equivalent to the claim periods specified in the labor protective provisions imposed by the Civil Aeronautics Board in connection with the merger of United Air Lines and Capital Airlines, unless otherwise agreed to. It is the intention of the parties hereto that this Letter of Agreement shall take precedence over any provisions of the Agreement between the Company and the Union which may be in conflict with this Letter of Agreement.

IN WITNESS WHEREOF, the parties hereto have signed this Letter of Agreement this 23rd day of June, 1961.

WITNESSES:	UNITED AIR LINES, INC.
/s/ C. M. Mason	/s/ R. F. Ahrens
/s/ P. M. Berthoud	R. F. Ahrens
/s/ R. H. Pollard	Senior Vice President-Personnel
WITNESSES:	INTERNATIONAL ASSOCIATION OF MACHINISTS
/s/ L. O. Redding	/s/ J. L. Reeves
/s/ J. Cervenka	President & General Chairman, District 141

[fol. 98] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 99]

EXHIBIT 5 TO AFFIDAVIT OF CHARLES M. MASON

ATTENTION

CAPITAL—UNITED EMPLOYEES

Our Brotherhood, on November 9, 1961, filed a suit in U. S. District Court in Cincinnati, Ohio, charging that United Air Lines, Inc., violated the August 3, 1959, contract between our Brotherhood and Capital Airlines, Inc., and various provisions of the Railway Labor Act by refusing to apply the terms of the agreement to former Capital employees represented by our Brotherhood who became United employes when Capital was merged with United.

In 1948, our Brotherhood signed an agreement with Capital covering rates of pay, rules and working conditions of clerical employes. This agreement was revised from time to time, in accordance with the Railway Labor Act, the last agreement being entered into on August 3, 1959. Among other things, the agreement provided:

> "All provisions of this Agreement shall be binding upon the successors or assigns of the Company and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employes involved."

On August 11, 1960, Capital and United entered into an agreement of merger. However, neither of the carriers gave any notice of the proposed merger to our Brotherhood. Representatives of our Brotherhood called the attention of Capital and United to the fact that the foregoing provisions of the agreement had not been complied with and requested a conference. United declined to confer and Capital representatives, at a meeting on November 28, 1960, stated they could not negotiate an agreement relating to employes which would be effective upon consummation of the merger or binding upon United.

The Brotherhood intervened in the proceedings before the Civil Aeronautics Board considering the joint applica-

tion of Capital and United for approval of the merger, and requested that Board, as a condition of its approval, require United to take over and apply the Brotherhood-Capital agreement to the employes of Capital covered by the agreement. The CAB, however, did not so condition its approval of the proposed merger in its order issued April 3, 1961, nor did it purport to pass on the issue of whether United would be legally justified in ignoring the Brotherhood-Capital agreement.

On May 29, 1961, shortly before consummation of the merger on June 1, the Brotherhood applied to the National Mediation Board for an interpretation of the August 3, 1959, agreement, with particular reference to the language [fol. 100] making its provisions "binding upon the successors or assigns" of Capital. The Mediation Board issued its opinion on August 28, 1961, finding that the language in question was "clear and unambiguous" and "means just what it says."

A meeting with United was requested by our Brotherhood on September 1, but United refused such a meeting by letter dated September 21.

The complaint of the Brotherhood alleges that "United's refusal to apply the provisions of the agreement of August 3, 1959, between the Brotherhood and Capital to any of the employes of Capital in the craft or class covered by such agreement and who became employees of United upon consummation of the merger" constitutes a violation of that agreement and is also a breach of the merger agreement which provided that liabilities and duties of Capital should attach to United and could be enforced against United the same as if they had been incurred by United. Additionally, the complaint charges that the Delaware Corporation Law, applicable to both Capital and United as Delaware corporations, was violated since that state's law provides that the liabilities of corporations shall not be lessened by consolidation or merger.

Finally, the complaint charges that provisions of the Railway Labor Act, requiring carriers subject to it to make and maintain agreements, prohibiting changes in rules and working conditions except in accordance with the procedures of the Act, and requiring that disputes as to the ap-

plication of agreements be settled by negotiation, have been violated.

The complaint requests the Court declare the legal rights of the parties, and specifically find "that United is a successor or assign of Capital" within the meaning of the August 3, 1959, agreement, that "United assumed the liabilities and duties" of that agreement because of the provisions in the merger agreement, that by operation of Delaware law United is bound by the Brotherhood-Capital agreement, that United be enjoined "from continuing its refusal to apply the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital to employes of Capital covered by that agreement who became employes of United upon the consummation of the merger," and that the Brotherhood be granted "all other legal or equitable relief to which it may be entitled."

(Insignia)

AIR TRANSPORT DIVISION

1015 Vine St. B. R. C. Cincinnati 2, Ohio

[fol. 101]

AFFIDAVIT OF C. PATE HUTCHENS, JR. TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT—Filed December 26, 1961

State of Illinois,
County of Cook, ss.

C. Pate Hutchens, Jr., being first duly sworn, on oath deposes and says:

1. I am the Administrative Assistant to the Director of Personnel, Field Services for United Air Lines, Inc. Prior to the merger of United and Capital Airlines, Inc., I was an employee of Capital, and had been since 1940. Immediately prior to the merger I was the Director of Personnel for Capital. In that capacity I was familiar with the collective bargaining relations between Capital and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Brotherhood"), plaintiff herein.

2. On May 13, 1947, Brotherhood was certified as the duly designated and authorized representative for the clerical, office, stores, fleet and passenger service employees of the Pennsylvania Central Airlines Corporation, for the purposes of the Railway Labor Act, by the National Mediation Board. Shortly thereafter the name of the Corporation was charged to Capital Airlines, Inc., the same company which was subsequently merged with United.

3. Capital maintained collective bargaining relations with the Brotherhood continuously from the time of its certification until the merger of Capital and United. The most recently negotiated collective bargaining agreement between Capital and the Brotherhood was dated August [fol. 102] 3, 1959, and is attached to the Complaint herein as Exhibit A.

4. At the time of the negotiation of this most recent collective bargaining agreement between Capital and Brotherhood there was also negotiated between them a Union Security Agreement set forth at pages 50 to 57 of Exhibit A to the Complaint. This Union Security Agreement provides generally that any person then an employee of Capital covered by the collective bargaining agreement between Capital and Brotherhood who was a member of Brotherhood as of February 1, 1959, would be required to maintain his membership in Brotherhood as a condition of employment and that any person becoming an employee after February 1, 1959, would be required to become a member of the Brotherhood as a condition of employment with Capital.

5. From February 1, 1959, to the effective date of the merger of Capital and United, Capital hired approximately 1,150 employees who were subject to the requirements of the Union Security Agreement between Capital and Brotherhood.

C. Pate Hutchens, Jr.

Subscribed and Sworn to before me this 20th day of December, 1961.

Catherine A. Vita, Notary Public.

(Seal)

[fol. 103]

AFFIDAVIT OF S. SZALMA TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT—Filed December 26, 1961

State of Colorado,
City and County of Denver, ss.

S. Szalma, being first duly sworn, on oath deposes and states:

1. I am Staff Assistant-Union Relations, Transportation Services Administration of United Air Lines, Inc., defendant herein.

2. Prior to the merger of United and Capital Airlines, Inc., I was an employee of Capital. Immediately prior to the merger I was the Superintendent of System Line Maintenance-Western Region and Acting Director of Industrial Relations.

3. In connection with my duties with Capital, I attended a meeting on November 28, 1960 at Capital's Washington, D. C. offices between representatives of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and of Capital. Mr. Robert J. Wilson, Vice President—Properties & Personnel, and I represented Capital at that meeting.

4. On November 30, 1960, I prepared a memorandum of minutes of the November 28, 1960, meeting, which memorandum accurately reflects the matters discussed at that meeting. A copy of this memorandum is attached hereto.

S. Szalma

Subscribed and Sworn to before me this 19th day of December, 1961.

Jo Madden, Notary Public.

(Seal)

[fol. 104]

ATTACHMENT TO SZALMA AFFIDAVIT

CAPITAL
Airlines

INTER-OFFICE CORRESPONDENCE

Date November 30, 1960

Re:

To Memorandum for the Record

From S. Szalma

Station

At the request of the representatives of the BRC, a meeting was held on November 28, 1960 in the office of Robert J. Wilson, for the purpose of discussing Article 1, paragraph (b) of the BRC Agreement.

The following named individuals were in attendance at the meeting:

William Mahoney	—BRC
Arthur Read	—BRC
T. L. Creekmore	—BRC
Robert J. Wilson	—CAP
S. Szalma	—CAP

The discussion was pursuant to the specific portion of Article 1, paragraph (b), "representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved".

The position of the BRC, as stated by Mr. Mahoney, was that Article 1(b) was violated by Capital when the provisions of that article (procedure and protection) were not negotiated beforehand and included as a basic requirement of the merger application.

Further, since it was not now possible to comply with that action, it was his position that Capital should now negotiate

the protection and procedure for its implementation and get some guarantee that United will honor such agreement as binding.

The Company position, as stated by Mr. Wilson, was that he did not agree that Capital was in violation of Article 1 (b).

Mr. Wilson pointed out that the subject article provided for certain action to be taken "90 days prior to such consolidation, or merger", not prior to or part of an application to merge.

Mr. Wilson stated that as the negotiating officer for Capital, he was willing and ready to accept the proposals of the [fol. 105] BRC for consideration and for negotiation, but that he could and would not imply or guarantee any resulting procedures to be binding on United Air Lines.

Mr. Wilson again asked Mr. Mahoney to submit his proposals for consideration and discussion, but Mr. Mahoney reiterated that he wanted to be assured first, that United would honor as binding, any agreement reached in the meeting.

Mr. Wilson repeated his statement, that he could not negotiate in behalf of United Air Lines, but could consider any proposals in behalf of Capital Airlines.

The meeting adjourned without the Brotherhood presenting any proposals.

S. Szalma

SS:rmb

cc: Robert J. Wilson

[fol. 106]

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT—
Filed February 23, 1962

The plaintiff, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, moves the Court to grant plaintiff summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure.

The ground for this motion is that the motion of the defendant United Air Lines, Inc., for summary judgment and the affidavits attached thereto show that the material facts alleged in the Complaint are not disputed and that plaintiff on such undisputed facts is entitled to judgment as a matter of law.

There are attached hereto in support of this motion the affidavits of Charles L. Dennis and James L. Highsaw, Jr.

Respectfully submitted,

Leonard D. Slutz
Roy G. Holmes

Leonard D. Slutz, Roy G. Holmes, 900 Tri-State Building, Cincinnati 2, Ohio;

James L. Highsaw, Jr., 620 Tower Building, Washing 5, D. C.; Attorneys for Brotherhood of Railway and Steamship Clerks

Of Counsel:

Nichols, Wood, Marx & Ginter, 900 Tri-State Building, Cincinnati 2, Ohio;

Mulholland, Robie & Hickey, 741 National Bank Building, Toledo 4, Ohio; 620 Tower Building, Washington 5, D. C.

February, 1962

[fol. 107]

AFFIDAVIT OF CHARLES L. DENNIS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed February 23, 1962

Hennepin County,
State of Minnesota, ss.

Charles L. Dennis, being duly sworn, deposes and says as follows:

1. That he is a Vice Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. His home address is 127 N.

Mayfield Avenue, Chicago, Illinois. His office address is Room 818, 9 South Clinton Street, Chicago 6, Illinois.

2. That his duties as a Vice Grand President of said Brotherhood include the supervision of the employees of air carriers represented pursuant to the provisions of the Railway Labor Act by said Brotherhood, and that in the execution of these duties he is familiar with the provisions of the agreement between Capital Airlines and said Brotherhood governing rates of pay, rules and working conditions of the craft or class of clerical, office, stores, fleet and passenger service employees of said air carrier.

3. That between the years 1936 and 1940 affiant served as Assistant General Chairman of the Brotherhood organization on the Chicago and North Western Railroad Company and that between 1940 and 1956 affiant served as General Chairman of the Brotherhood organization on such railroad. In 1956 he assumed the duties of a Vice Grand President of the Brotherhood. During the approximately [fol. 108] 20 years of service as an Assistant General Chairman and General Chairman of the Brotherhood organization on the Chicago and North Western Railroad Company affiant became familiar with the effects of various types of railroad consolidations and merger transactions upon rail employees and with the provisions of the Washington Agreement of May, 1936 (popularly called the Washington Job Agreement).

4. It is United's intention and it has so advised affiant that it will not apply the rates of pay, rules and working conditions of the agreement between Capital and the Brotherhood effective August 3, 1959, to any of the craft or class of clerical, office, stores, fleet and passenger service employees. If United is permitted to carry out this intention, the employees of Capital in said craft or class represented by the Brotherhood will lose all of the benefits and protection of said agreement. Between 400-500 employees of Capital represented by the Brotherhood on Capital fall within the classification of stores, commissary and cargo employees and have been included in the contract between United and the International Association of Ma-

chinists. The question of the validity of such action is not involved in the present suit.

5. Article 1, paragraph (h) of said agreement also provides as follows:

> "All provisions of this Agreement shall be binding upon the successors or assigns of the Company and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation, or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the [fol. 109] protection to be afforded the employees involved."

Neither Capital nor United notified the Brotherhood prior to the execution of their merger agreement of August 11, 1960, of the proposed merger, nor has either air carrier at any time made any effort to comply with the provisions of said agreement to the effect that such provisions shall be binding upon the successors or assigns of Capital and that negotiations will be held with the Brotherhood for the procedures to be followed and the protection to be afforded the employees covered by the agreement upon any consolidation or merger. When the Brotherhood first learned of the merger agreement between Capital and United of August 11, 1960, it promptly wrote to both carriers calling their attention to the above-quoted provisions of the collective bargaining agreement.

The letter to Mr. Robert J. Wilson of Capital Airlines, dated August 16, 1960, introduced into the proceedings before the Civil Aeronautics Board as Exhibit No. BRC/CAPITAL-7 stated that "this provision is self-explanatory and clearly calls for the procedure suggested by this letter." The procedure suggested by the letter was that "it would be desirable both in the interests of the parties as well as in the interests of the Civil Aeronautics Board in the proceeding before it for an agreement covering the protection of employees to be entered into not only between Capital and the Clerks but also to include United as a party." It was requested that Capital contact the General

Chairman of the Brotherhood organization on Capital as soon as possible on this matter. The response from Mr. Wilson under date of August 29, 1960, advised the General Chairman of the Brotherhood that Capital was "familiar [fol. 110] with the provision in our contract which you quoted in your letter and will contact you at a future date to discuss the matter." Upon information and belief affiant asserts that Capital Airlines did not contact any representative of the Brotherhood in response to the letter of August 16, 1960, until after the completion of the hearing proceedings before the Civil Aeronautics Board and that at that time Mr. Wilson advised that Capital was unable to enter into any arrangements which would have any binding effect upon United.

Under date of August 16, 1960, Mr. Patterson, President of United, was also advised by the General Chairman of the Brotherhood organization on Capital of the existence of the quoted contract provisions and a request was made for negotiations with the company on the subject matter thereof. This advice was contained in a letter introduced into the proceedings before the Board as Exhibit BRC/CAPITAL-8. This letter set forth the above-quoted provisions of the collective bargaining agreement and then states as follows:

> "I particularly call your attention to the fact that Capital has contracted with the Brotherhood that all provisions of the outstanding collective bargaining agreement shall be binding upon the successors or assigns of the Company and that anything in the merger agreement to the contrary is in our opinion a direct violation of Capital's existing contracts."

This letter also proposed a joint meeting between Capital and United to work out in accordance with the provisions of the collective bargaining agreement "the procedure to be followed and the protection to be afforded the employees involved." Under date of August 26, 1960, Mr. R. F. Ahrens, Senior Vice President-Personnel of United, replied to the [fol. 111] Brotherhood's letter and in effect declined to have any meeting or any discussions with the Brotherhood concerning this matter.

6. On May 9, 1961, affiant met with Mr. Charles Mason, Assistant to the Senior Vice President of United in charge of Personnel, in United's offices in Chicago to discuss the proposed merger and its effect upon employees of Capital represented by the Brotherhood. The results of this meeting were that United asserted that it would not assume the contract between Capital and the Brotherhood covering employees of Capital represented by the Brotherhood.

United has subsequently refused to even meet with the Brotherhood and discuss the matter thus leaving no alternative but a suit to protect the rights of the employees involved. The only matter United has been willing to discuss with the Brotherhood has been the integration of those employees who have been put under the I.A.M. agreement. The Brotherhood did not participate in any such discussions because of United's refusal to discuss implementing agreements covering the remainder of the former Capital employees governed by the Agreement of August 3, 1959.

7. At page 18 of its legal memorandum in support of its motion in this case United asserts, citing paragraph 15 of the affidavit of Mr. Mason, that "although not a matter of legal significance," the former Capital employees who were covered by the provisions of the Agreement of August 3, 1959, between the Brotherhood and Capital enjoy greater benefits now than they would have received if United had assumed the obligations of such an agreement upon consummation of the merger. I disagree with this statement [fol. 112] for the following reasons:

a. The seniority rights earned under the Capital-Brotherhood agreement by a Capital employee guarantee to him many benefits such as, payroll classification, rate of pay, rest days, shift preference and shift differentials, right to transfer or not transfer from one location to another, vacation rights, and preference to overtime work on the basis of his seniority status as established by agreement on seniority rosters. United has informed the Brotherhood that they are not required to respect these seniority rights, and that United management would be the sole judge as to the rights which these employees will retain upon their integration into United's employment forces.

b. The Capital-Brotherhood agreement contains provisions for the protection of employees in the event they are cited for discharge or discipline by supervisory personnel. In the event of such citation Capital employees are entitled to fair and impartial hearings, appellate procedures within the Company and ultimately the presentation of their case to a neutral arbitrator. During these proceedings Capital employees are entitled to be represented by the Brotherhood. Since United has refused to recognize the Capital-Brotherhood agreement, the Capital employees now protected by the discharge and discipline provisions of the agreement will be subject to discipline and discharge at the will of United. Should such discipline and discharge occur, the employees affected will be irreparably injured since they can never be adequately compensated for the harm which they will have suffered. The statement in paragraph 16 of Mr. Mason's affidavit to the effect that [fol. 113] United has established a grievance program for the employees involved does not affect this conclusion since this is no longer a matter of contract right.

c. The Capital-Brotherhood agreement provides for wages by automatic increment steps based on length of service with the carrier. These increment pay steps occur after stipulated periods of time and range from $6.00 per month to $30.00 per month dependent upon payroll classification and payroll grouping. Many employees were entitled to receive these automatic pay increases under the Brotherhood agreement during the 30 days after the consummation of the merger. Also many employees are entitled to longevity pay increases and shift differentials. There are also specific provisions which apply when employees move from one classification in one group to another classification in a different group. Under the United policy governing wages there are no specific guarantees and an employee's rate of pay is subject to the sole discretion of the local supervisor at a particular point. In no instance are increases automatic under the United policy.

Therefore, the present clerical and related employees of Capital are deprived of the above-described wage rights.

d. In addition to deprivation of the above-described rights and benefits under the Capital-Brotherhood agreement, the clerical and related employees of Capital are deprived of or subject to restrictions on the following benefits which they now receive under the Capital-Brotherhood agreement:

(1) Five-day guarantee

(2) Eight-hour day guarantee

(3) Sick leave allowances

[fol. 114] (4) Overtime allowances

(5) Assigned starting times

(6) Probationary periods

(7) Adjustment of grievances

(8) Group insurance plans

(9) Pension plans

(10) Free transportation

(11) Leave of absence

(12) Non-penalty for refusal of promotion

e. With respect to each and every employee benefit in the Agreement of August 3, 1959, between Capital and the Brotherhood, the elimination of the contract to those benefits by United's actions and the substitution of Company rules which are not binding injures the employees involved.

8. I appeared as a representative of the Brotherhood in the proceeding before the National Mediation Board on the Brotherhood's application in Case No. A-6037, for an interpretation of Article 1(b) of the Agreement of August 3, 1959. I have reviewed the statements set forth at pages 5-8 of the memorandum of the Brotherhood in opposition to United's motion and in support of the cross-motion of the organization in this case pertaining to statements made by United to the Mediation Board in the interpretation proceeding and affirm that these statements are true and cor-

rect reproductions of statements and arguments by United. submitted either at the hearing on July 11, 1961, or in a rebuttal statement dated July 26, 1961.

9. My lengthy experience in the railroad industry, as indicated in paragraph 3 of this affidavit, has made me familiar with the practices and procedures of railroads in cases of mergers and consolidations. It is the customary practice in the railroad industry in the cases of mergers [fol. 115] and consolidations for the surviving corporation to assume the collective bargaining agreements of the non-surviving carrier and then to work out the application thereof through implementing agreements such as is contemplated by Article 1(b) of the Agreement of August 3, 1959, here involved. I am familiar with the agreement entered into on June 18, 1959, in Interstate Commerce Commission Finance Docket No. 20599 between the Railway Labor Executives' Association, with which the Brotherhood is affiliated, and the Norfolk and Western Railroad. Paragraph (c) of this agreement reads as follows:

> "(c) The Norfolk & Western will take over and assume, subject to the provisions of the said Washington Job Protection Agreement, all contracts, schedules and agreements between the Virginian and the constituent labor organizations of the Railway Labor Executives' Association concerning rates of pay, rules, and working conditions in effect at the time of approval of the said merger, and will be bound by the terms and provisions thereof, subject to the changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if the Norfolk & Western had been a party thereto; *provided, however*, that the assumption of such agreements shall not prevent the consolidation of facilities and integration of employment forces subject to implementing agreements upon application of the terms of the Washington Job Protection Agreement and this agreement."

Pursuant to this agreement the Norfolk & Western did take over and assume the contracts, schedules, and agreements

between the Virginian and the Brotherhood and has continued to be bound by the terms and provisions thereof subject to changes therein in accordance with the provisions of the Railway Labor Act.

[fol. 116] 10. The Brotherhood does not and has not asserted any representation rights over an entire craft or class of United employees by reason of the August 3, 1959, agreement. It has sought only to protect the rights of the former Capital employees covered by that agreement. With respect to representation of the entire craft or class the Brotherhood has taken appropriate and legal steps under the Railway Labor Act looking toward a representation election. United's criticism of those efforts, as reflected in paragraph 18 of the affidavit of Mr. Mason is irrelevant to the present suit and is contrary to the spirit if not the letter of Section 2, Fourth of the Railway Labor Act which prohibits a carrier from "in any way" questioning the right of its employees to organize or assist in organizing the labor organization of their choice.

Charles L. Dennis

(Seal)

Subscribed and sworn to before me this 21 day of February, 1962.

Morris A. Olsen, Notary Public Hennepin County, Minn., My commission expires Jan. 21, 1966.

[fol. 117]

AFFIDAVIT OF JAMES L. HIGHSAW, JR. TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed February 23, 1962

Washington,
District of Columbia, ss.

James L. Highsaw, Jr., being duly sworn, deposes and says as follows:

1. That he is a partner in the Law Firm of Mulholland, Robie & Hickey and is one of the counsel for the Brotherhood of Railway and Steamship Clerks in the above-entitled case.

2. That this firm was also counsel for the International Association of Machinists in the proceeding in CAB Docket No. 6998 involving the application of Eastern Air Lines for the acquisition of Colonial Airlines; that affiant has examined the transcript of testimony and the joint exhibits of Colonial and Eastern in that proceeding relating to Eastern's assumption of the collective bargaining agreements of Colonial upon consummation of the acquisition and merger, and there is attached hereto as Appendix A a true and correct copy of Joint Exhibit No. 19 of the two carriers in the proceeding. Affiant further states that at page 1658 of the official transcript of the proceedings Mr. Joseph F. Brock, Vice President, Industrial and Personnel Relations of Eastern, testified as follows on November 7, 1952, with respect to Eastern's undertaking to honor the collective bargaining agreements of Colonial Airlines:

> "Q. I have one further question: Does Eastern Airlines intend to honor and work by the Labor agreements which Colonial Airlines has with its respective labor organizations and continue to work under the Colonial [fol. 118] agreements until, say, what you might call a master agreement is negotiated?
>
> "A. I believe we cover that in our Exhibit 18, last pagragraph:
>
> "'Eastern will, of course, assume and fulfill Colonial's obligations under that carrier's contracts with labor organizations respecting its personnel.'
>
> "Q. That is in your Exhibit 18?
>
> "A. Yes, Volume 1, Exhibit 18, last paragraph."

3. That affiant is counsel for the Air Line Pilots Association in the proceeding before the Civil Aeronautics Board, identified as *Alaska Coastal Airlines-Ellis Air Lines, Inc., Merger Case* (CAB Docket No. 13028), and there is attached hereto as Appendix B a true and correct copy of the stipulation and agreement entered into between the four air carriers involved in the proposed consolidation and merger before the Civil Aeronautics Board in such proceeding, paragraph 4 of which provides for the new consolidated company to take over and continue in effect the collective bargaining agreement between the Air Line Pilots Associ-

ation and Ellis pending a representation determination for all pilot personnel of the new company and the negotiation of a new agreement covering all such personnel. This stipulation and agreement appears as Exhibit E in the record of the Civil Aeronautics Board proceedings, page 7 of the hearing transcrip. Affiant further states that an identical agreement has been entered into between the four carriers involved and the independent pilot union representing pilot personnel of Alaska Coastal Airlines, which was filed as Exhibit F in the CAB proceeding. Affiant also states that on hearing transcript. Affiant further states that an identical [fol. 119] February 9, 1962, CAB Hearing Examiner James S. Keith served his recommended decision providing for approval of such consolidation and merger. The date for filing exceptions thereto expired on February 14, 1962. The only exceptions which have been filed are those of the applicants which relate solely to the treatment of mail pay upon the consummation of the consolidation.

4. That upon consideration of the motion and supporting memorandum of United Air Lines in this proceeding, affiant discussed with Mr. Plato E. Papps, the General Counsel of the International Association of Machinists, the claims of United that the dispute between the Brotherhood and the air carrier in this case involved the matter of representation rather than contract rights and that the International Association of Machinists was an indispensable party to the case. There is attached hereto as Appendix C an original of a letter, with attachments, which affiant has received from the General Counsel of the International Association of Machinists stating in part that there is no dispute between the Brotherhood and the International Association of Machinists with respect to the representation of employees on United and that the International Association of Machinists has no interest in the present litigation and no desire to be a party thereto.

James L. Highsaw, Jr.

(Seal)

Subscribed and sworn to before me this 19th day of February, 1962.

Charlotte D. Kimball, Notary Public, My Commission expires August 14, 1963.

[fol. 120]

APPENDIX A TO AFFIDAVIT OF JAMES L. HIGHSAW

COLONIAL - EASTERN

Integration Agreement Case

CAB Docket 6998

Exhibit No. 19
Page 1 of 2

BUREAU COUNSEL'S REQUEST NO. 22:

"List agreements with all labor organization with whom Colonial and Eastern bargained collectively and expiration dates of such agreements. Copies of the agreements are not requested, however, they should be made available for inspection at the time of the hearing."

COLONIAL:

Classification of Employees	Represented By	Termination Date
Clerical, Office & Station	Intl. Assn. of Machinists	9/30/55
Dispatchers & Jr. Dispatchers	Air Line Dispatchers Assn.	2/29/56
Maintenance Foremen & Supervisors	Intl. Assn. of Machinists	10/ 1/56
Maintenance, Stores, Commissary & Cargo	Intl. Assn. of Machinists	10/ 1/56
Pilots	Air Line Pilots Assn.	7/ 1/56
Radio & Teletype Operators	Intl. Assn. of Machinists	2/ 1/56
Stewardesses	Air Line Stewards & Stewardesses Assn.	1/ 1/55*

* The Air Line Stewards & Stewardesses Association has notified us of a intention to file proposed changes in the Agreement. To date such proposals have not been received by Colonial Airlines, Inc.

[fol. 121]

COLONIAL - EASTERN

Integration Agreement Case

CAB Docket 6998

Exhibit No. 19
Page 2 of 2

EASTERN:

Employees Covered by Labor Union Agreements	Labor Organizations	Expiration Date
Pilots	ALPA - Air Line Pilots Association	7/ 1/57
Stewards & Stewardesses	ALSSA - Air Line Stewards & Stewardesses Association	7/15/56
Mechanics & Store Employees	IAM - International Association of Machinists	10/ 1/56
Engineers	Flight Engineers International Association	Under negotiation
Communication Employees	Air Line Communication Employees Association, Unaffiliated	10/ 1/56

Eastern intends to continue to deal with these employees under the terms of those agreements and in accordance with the Railway Labor Act. Therefore, it is impossible to see how collective bargaining or labor agreements would be adversely affected.

[fol. 122]

APPENDIX B TO AFFIDAVIT OF JAMES L. HIGHSAW

BEFORE THE
CIVIL AERONAUTICS BOARD
Docket No. 13028

In the matter of the application of
ALASKA COASTAL AIRLINES
and
ELLIS AIR LINES, INC.
under Section 408 of the Federal Aviation Act of 1958, as amended.

STIPULATION AND AGREEMENT BETWEEN AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ALASKA AIR TRANSPORT, INC., ALASKA COASTAL AIRLINES, ELLIS AIR LINES, INC., AND MARINE AIRWAYS

The Air Line Pilots Association, International, Alaska Air Transport, Inc., Alaska Coastal Airlines, Ellis Air Lines, Inc., and Marine Airways, parties in the above-entitled proceeding, stipulate and agree as follows:

1. Alaska Coastal Airlines (Coastal) and Ellis Air Lines, Inc. (Ellis), have requested the Board's approval under Section 408 of the Federal Aviation Act of 1958 of the consolidation of Ellis, Alaska Air Transport, Inc. (Alaska Air), and the Marine Airways (Marine) into a single air carrier corporation to be known as Alaska Coastal-Ellis Airlines (Alaska-Ellis).

2. On October 6, 1960, the Air Line Pilots Association, International (ALPA) and Ellis executed a collective bargaining agreement pursuant to the provisions of the Railway Labor Act, effective September 1, 1960, covering rates of pay, rules, and working conditions of the craft or class

[fol. 123] of pilot personnel of Ellis which contract is presently in full force and effect.

3. On December 29, 1961, the Air Line Pilots Association, International (ALPA) filed a response in the above entitled proceeding to the Order to Show Cause (Order No. E-17861) dated December 21, 1961, issued by the Board in such proceeding. In its response, ALPA raised certain questions concerning the position of the applicants herein with respect to the status of the collective bargaining agreement dated October 6, 1960, between ALPA and Ellis covering rates of pay, rules and working conditions of the craft or class of pilot personnel of Ellis. In its response ALPA also raised a question concerning the imposition of employee protective conditions under any Board approval of the proposed consolidation.

4. Alaska Air, Coastal, Ellis, and Marine further agree and stipulate that, in the event the Board approves the proposed consolidation, the new entity Alaska-Ellis will continue in effect the collective bargaining agreement between ALPA and Ellis referred to in paragraph 2 until such time as a representation determination is made for all pilot personnel of Alaska-Ellis pursuant to the provisions of the Railway Labor Act. Pending such determination, and the determination of new rates of pay, rules and working conditions covering all pilot personnel of Alaska-Ellis, the rates of pay, rules and working conditions of Ellis pilot personnel who become employees of Alaska-Ellis shall be governed by the terms of said agreement.

5. Alaska Air, Coastal, Ellis and Marine agree and stipulate that in the event the Board approves the consolidation [fol. 124] application of the above entitled proceeding, it may include in its order of approval as a condition thereof labor protective conditions similar to those imposed by the Board in its approval of the merger of Capital Airlines and United Air Lines.

6. The parties to this stipulation further agree that it shall be filed with the Civil Aeronautics Board in the above entitled proceeding and shall become a part of the record of such proceeding.

7. ALPA agrees that upon the filing of this stipulation with the Civil Aeronautics Board its objections to the approval of the application for consolidation in the above entitled proceeding without hearing upon the issues raised by ALPA in its response of December 29, 1961, are to be considered as withdrawn.

s/ Theodore I. Seamon

Theodore I. Seamon
Attorney for Alaska Air Transport, Inc., Marine Airways, and Alaska Coastal Airlines

s/ John Marshall

John Marshall
Attorney for Ellis Air Lines, Inc.

s/ James L. Highsaw, Jr.

James L. Highsaw, Jr.
Attorney for Air Line Pilots Association, International

January 19, 1962

[fol. 125]

APPENDIX C TO AFFIDAVIT OF JAMES L. HIGHSAW

INTERNATIONAL ASSOCIATION OF MACHINISTS

(Letterhead)

11-R-3 49-United Airlines

February 16, 1962

Subj: Brotherhood of Railway and Steamship Clerks vs United Airlines—CA-4904 (US, DC, Southern Dist., Ohio, Western Div.)

SPECIAL DELIVERY

James Highsaw, Esq.
Mulholland, Robie & Hickey
Tower Bldg.—14th & K Sts., N.W.
Washington 5, D. C.

Dear Mr. Highsaw:

Thank you for furnishing me with a copy of the Complaint filed by the Brotherhood of Railway and Steamship Clerks in the above-captioned matter (CA-4904).

As you know, I am familiar with the situation on United Airlines with respect to the International Association of Machinists and its representation of employees with that Carrier.

This is to advise that there no dispute between the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists with respect to the representation of employees and, accordingly, the IAM has no interest and no desire to be a party to the litigation in the above subject matter.

In fact, I am calling to your attention a recent opinion (copy enclosed) and judgment of the United States District

Court for the District of Massachusetts in CA-61-97-C in which Local Lodge 1505 of the IBEW sought to intervene and participate in an arbitration proceeding directed by the Court pursuant to a collective bargaining agreement by and between the International Association of Machinists and the Raytheon Manufacturing Company. In that case the Court denied the intervention.

While not exactly in point, it is our opinion that our standing to intervene in the above-named litigation or our rights as an indispensable party are doubtful and in any event for the reasons stated above, we have no desire to participate or be a party thereto.

Very truly yours,

s/ Plato E. Papps

Plato E. Papps
General Counsel

Encl. (2) outlined above
PP/lg

[fol. 126]

IN THE UNITED STATES DISTRICT COURT

SUPPLEMENTAL AFFIDAVIT OF CHARLES M. MASON—
Filed March 12, 1962

State of Illinois,
County of Cook, ss.:

CHARLES M. MASON, being first duly sworn, on oath deposes and says:

1. I am Senior Vice President—Personnel of United Air Lines, Inc. I have previously filed an affidavit in this proceeding in support of United's Motion to Dismiss or for Summary Judgment.

2. I have read the affidavits of Charles L. Dennis and James L. Highsaw, Jr., with supporting exhibits, including the letter of February 16, 1962, of Plato E. Papps, general counsel of the IAM, filed herein by plaintiff Brotherhood.

3. The Ramp and Stores Agreement between United and the IAM, referred to in paragraph [illegible] prior affidavit and attached as Exhibit 3 to that affidavit, was negotiated by J. E. Reeves, System General Chairman, District 141, IAM, on behalf of the IAM, and me, among others, on behalf of United. Mr. Reeves has negotiated prior Ramp and Stores Agreements on behalf of the IAM for many years. These agreements have been administered on behalf of the IAM by Mr. Reeves. Mr. Plato E. Papps has never participated in the negotiation or administration of any prior or the present Ramp and Stores Agreements.

[fol. 127] 4. The Letters of Agreement between United and the IAM, by which there were integrated into the United-IAM Ramp and Stores Agreement the approximately 530 former Capital employees who were represented by Brotherhood and who were under the Brotherhood-Capital Agreement while Capital employees, were negotiated by Mr. Reeves on behalf of the IAM and me, among others, on behalf of United. These Letters of Agreement are Exhibit 4 to my prior affidavit. These Letters have been implemented on behalf of the IAM by Mr. Reeves. Mr. Papps has not participated in the negotiation or implementation of these Letters.

5. The 530 former Capital employees have been completely integrated into the United system, and their terms and conditions of employment are determined by the provisions of the Ramp and Stores Agreement. They have all become members of the IAM pursuant to the union security provisions and must maintain this membership as a condition of employment. Article XX, Ramp and Stores Agreement. In addition, many of them have elected to have their periodic membership dues to the IAM deducted by United from their pay checks, as provided in the "dues check-off" provisions of Article XX of the Ramp and Stores Agreement. Sums so collected by United have been transmitted to the IAM. Some of these former Capital employees are now serving as Stewards and Local Committeemen for

the IAM, and some of these are representing United [fol. 128] employees who were employed by United prior to the merger as well as former Capital employees. Former Capital employees have bid for and have been awarded premium jobs over employees who were employed by United prior to the merger, all as provided in the Ramp and Stores Agreement.

6. On March 7, 1962, I discussed with Mr. Reeves the letter of Mr. Papps attached to the Highsaw affidavit, and the Dennis affidavit, both referred to in paragraph 2 above. Mr. Reeves was aware of the content of these documents. He advised me that the status of the 530 former Capital employees had not been changed; that they were still covered by the terms of the IAM Ramp and Stores Agreement; that the IAM expected them to maintain their membership in the IAM as a condition of employment with United; that the IAM expected United to continue the dues check-off; that the IAM would continue to represent these employees under the provisions of the Ramp and Stores Agreement and had no intention of making any change in this respect.

7. United has received no notice from the IAM reflecting any change in the status of the 530 former Capital employees.

8. Mr. Reeves was the primary witness for the IAM during the United-Capital Merger hearings before CAB Examiner Wrenn. During his testimony at these hearings Mr. Reeves stated:

"... I think the mechanical employees of Capital Air- [fol. 129] lines should come under the United Air Lines agreements without loss of any monetary benefits whether it be in schedule A or fringe or without penalty.

"At the same time, without getting into a jurisdictional battle, we would like to welcome the ramp and stores employees on Capital Airlines who are now covered by a BRC agreement into the IAM where the IAM similar employees are covered by an IAM agreement." (Tr. 819)

9. When the anticipated merger of United and Capital was first announced, Mr. W. A. Patterson, President of United, announced that employment with United would be offered to all former Capital employees on the effective date of the merger, and this same representation was made to the CAB during hearings on the merger. The merger was made effective on June 1, 1961 at which time Capital went out of business and ceased to exist as a corporation. Employment with United has in fact been offered to all former Capital employees, including those who were formerly represented by the Brotherhood while employees of Capital.

10. I have discussed with officials of Braniff International Airways and of Eastern Airlines the integration of employees and operations after the Braniff-Midcontinent merger and the Eastern-Colonial merger. I have been informed by them that in each of these mergers the surviving carrier voluntarily agreed to assume the collective bargaining agreements of the disappearing carrier; that in each instance it was not possible to integrate the employees or operations of the two merging carriers while separate bargaining agree-
[fol. 130] ments were in effect for the same groups of employees of each of the merging carriers; that until the agreements of the disappearing carrier were cancelled the two merging carriers were operated as separate airlines.

Charles M. Mason

Subscribed and Sworn to before me this 9th day of March, 1962.

(unreadable signature)
Notary Public

(Seal)

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed August 9, 1962

Although the defendant's motion is alternative in form, for present purposes it may be stated that this case has been submitted to the Court on cross motions for summary judgment; the alternative request of the defendant's motion is that the action be dismissed for lack of jurisdiction. Each party has filed extensive, even exhaustive, memoranda in support of its own position and in opposition to that urged by the other, and has filed protracted and detailed affidavits. Additionally, careful and capable oral arguments were made, and it might be stated that the transcript of that argument has been reread since the other filings and authorities have been studied.

After consideration of the various contentions presented, few of which can be summarily disposed of, it has been [fol. 131] concluded that the first ground set forth in the defendant's motion provides an obstacle to the taking of jurisdiction by this court. That ground is stated in the motion as follows:

> "1. The Court is without jurisdiction of this cause since it relates to a dispute as to who are the representatives under the Railway Labor Act of certain of the employees of United Air Lines, Inc. Exclusive jurisdiction to determine such a dispute vests with the National Mediation Board under the provisions of Section 2, Ninth, of the Railway Labor Act (45 U.S.C. §152, Ninth)."

Despite some possible clouding of this point, and perhaps even some attempted shift of position, on the part of the plaintiff, the fact remains that its Complaint clearly states that this action was brought because of the existence of "an actual controversy" under a "collective bargaining agreement executed pursuant to the provisions of the Railway Labor Act (45 U.S.C. Sections 151 et seq.)" After having so brought the action, plaintiff now contends (p. 32, plaintiff's first brief) that the issue here presented is "for the courts under the law of contracts . . . and not an issue

within the competence of the Mediation Board under the Railway Labor Act."

Under this theory, and upon the contention that this suit is not concerned with either a "representation dispute" or a "jurisdictional dispute between labor organizations," plaintiff seeks to avoid the consequences of three 1943 decisions by the Supreme Court which would otherwise be controlling. (*Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297; *General Committee* v. *M.K.T.R. Railroad Co.*, 320 U. S. 323; and *General Committee* v. [fol. 132] *Southern Pacific Co.*, 320 U. S. 338). Without here holding that this action fails to fall within either of those two categories nor that the triune of 1943 cases are limited thereto, we find them to have present application.

Plaintiff has urged (p. 7, second brief) that *Randolph* v. *Missouri, K. & T. R. Co.*, 85 F. Supp. 846 (D.C. Mo., 1949) is in point, but it appears to be distinguishable on the facts. It is true that this plaintiff had earlier attempted to have the National Mediation Board declare that it was the collective bargaining representative of certain of defendant's employees by requesting an interpretation of a mediation agreement (Complaint, Exhibit B). However, the plaintiff has never requested that the Board investigate any dispute as to who has been chosen by a majority of the employees as their authorized representative, nor has the plaintiff requested the Board to make a bargaining agent certification. The latter two requests are among those within the jurisdiction of the National Mediation Board (45 U.S.C. Section 152, Ninth). Hence the rationale of the *Randolph* case has no application here.

In spite of the fact that anything said following the above expression of our conclusion is obiter dictum, we feel constrained to observe that despite its own protestations we fail to see how this action could be consummated without joinder of the International Association of Machinists.

Defendant's motion to dismiss for lack of jurisdiction is found to be well taken.

[fol. 133]

IN THE UNITED STATES DISTRICT COURT

ORDER—Filed August 29, 1962

This cause came on to be heard on the motion of defendant, United Air Lines, Inc., to dismiss the Complaint under Rule 12 of the Federal Rules of Civil Procedure or in the alternative for summary judgment under Rule 56 of said Rules and on the motion of plaintiff for summary judgment under said Rule 56. The Court has considered said motions in light of the pleadings, affidavits and exhibits, together with the memoranda of authorities, filed and submitted by the respective parties and the oral arguments thereon, and has filed its Memorandum Opinion of August 9, 1962 addressed to said motions, and it appearing that this Court is without jurisdiction over the subject matter for the reason that the same relates to a dispute as to who are the representatives under the Railway Labor Act of certain of the employees of defendant, United Air Lines, Inc., and that exclusive jurisdiction of said dispute is vested with the National Mediation Board under the provisions of Section 2, Ninth, of the Railway Labor Act, it is

Ordered that the motion of defendant, United Air Lines, Inc., to dismiss the Complaint be and the same hereby is granted, and it is

Further Ordered that the respective motions of the parties for summary judgment be and the same hereby are denied for lack of jurisdiction, and it is

[fol. 134] Further Ordered that plaintiff pay the costs of this action.

To all of which plaintiff excepts.

Enter

John W. Peck, Judge, U.S.D.C.

Jack G. Evans, Attorney for Defendant.

Have Seen:

Roy G. Holmes, Attorney for Plaintiff.

Dated: 8/29/62

[fol. 135]

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 10, 1962

Notice is hereby given that Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, the Plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order granting the motion of the Defendant above named to dismiss the complaint, entered in this action on the 29th day of August, 1962.

Leonard D. Slutz, Roy G. Holmes, 900 Tri-State Building, Cincinnati 2, Ohio;

James L. Highsaw, 620 Tower Building, Washington 5, D. C., By Roy G. Holmes,

Attorneys for Appellant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

Of Counsel:

Nichols Wood Marx & Ginter, 900 Tri-State Building, Cincinnati 2, Ohio;

Mulholland Robie & Hickey, 620 Tower Building, Washington 5, D. C.

[fol. 136]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Before: Miller, O'Sullivan and Phillips, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—October 7, 1963

This cause is argued by James L. Highsaw, Jr. for plaintiff-appellant and by Stuart Bernstein for defendant-appellee, and is submitted to the Court.

[fol. 137]

IN THE UNITED STATES COURT OF APPEALS

Appeal from the United States District Court for the Southern District of Ohio.

JUDGMENT—Filed December 17, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Harry Phillips, United States Circuit Judge.

[fol. 138] [File endorsement omitted]

No. 15176

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Before Miller, O'Sullivan and Phillips, Circuit Judges.

OPINION—Decided December 17, 1963

PHILLIPS, Circuit Judge. This case arises out of the merger of Capital Airlines, Inc. into United Airlines, appellee herein, on June 1, 1961. The facts concerning the

background and details of this merger are set forth in *Northwest Airlines, Inc.* v. *C.A.B.*, 303 F.2d 395 (C.A. D.C.), affirming the approval of the merger by the Civil Aeronautics Board.

In May 1947 appellant was certified by the National Mediation Board pursuant to the Railway Labor Act,[1] 45 U.S.C. § 151 et seq, as the designated bargaining agent for the employees of Capital in the craft or class of clerical, office, stores, fleet and passenger service. Pursuant to this certification, appellant and Capital entered into a collective [fol. 139] bargaining agreement effective August 1, 1948, which, with certain revisions, was in effect immediately prior to the time Capital was merged into appellee.

Article 1(b) of this collective bargaining agreement contained the following provision:

> "All provisions of this agreement shall be binding upon the successors or assigns of the Company (i.e. Capital) and in case of a consolidation or merger, the Company (i.e. Capital) will notify the Brotherhood at least 90 days prior to such consolidation, or merger, and representatives of the Company (i.e. Capital) and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved."

The merger agreement between appellee and Capital provided as follows:

> "United . . . shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations; . . . and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to United, and may be enforced against

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[1] The Railway Labor Act, first adopted in 1926, was extended to air carriers in 1936 by the additions of Title II, 45 U.S.C. § 181 et seq., which applies all the provisions of the Act (with certain exceptions not involved here) to "every common carrier by air . . . and . . . person who performs any work as an employee . . . of such carrier." 45 U.S.C. § 181.

it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

Appellee announced from the outset of the merger proceedings that it would not assume or be bound by any of Capital's labor agreements. It is not contended that by the above-quoted language of the merger agreement appellee intended to assume the obligations of Capital under any of its collective bargaining agreements, or that appellee at any time made any representations to the effect that it as successor would be bound by the agreement between appellant and Capital.

Appellant participated as an intervenor in the proceedings before the Civil Aeronautics Board, urging that, if that Board should approve the proposed merger, this collective bargaining agreement be imposed upon appellee as a condition thereof. The Board refused to impose this condition in its order approving the merger, stating that this was a matter to be worked out "in accordance with regular procedures applicable to the matter of representation and agreement." Appellant appealed from the Board's decision to the Court of Appeals for the District of Colum- [fol. 140] bia, but thereafter withdrew its appeal with the acquiescence of the other parties.

This suit was filed by appellant seeking a declaration that appellee was bound by the terms of appellant's collective bargaining agreement with Capital and to enjoin appellee from refusing to apply that agreement to those former employees of Capital covered thereby who became employees of appellee upon consummation of the merger. Appellee moved to dismiss the complaint or for summary judgment upon the following grounds: The cause involved a dispute as to who were the representatives under the Railway Labor Act of certain of its employees and hence exclusive jurisdiction lay with the National Mediation Board; if the requested relief were granted appellee would be required to treat with a bargaining representative for a minority of a craft or class, contrary to the provisions of the Railway Labor Act; that the agreement between appellant and Capital revealed on its face that it could not be legally or practically applied to less than an entire craft or

class; that another labor organization had representation rights for part of the group upon which appellant was seeking to impose its agreement with Capital and hence this other labor organization was an indispensable party to the action.

Appellant filed a cross-motion for summary judgment upon the ground that the material facts alleged in the complaint were not in dispute and that appellant on such undisputed facts is entitled to judgment as a matter of law.

The District Court denied both motions for summary judgment for lack of jurisdiction, and granted appellee's motion to dismiss the complaint, holding that the case relates to a dispute as to who are representatives under the Railway Labor Act of certain employees of appellee and that exclusive jurisdiction to determine such a dispute vests with the National Mediation Board under the provisions of Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 152, Ninth.

We affirm the District Court.

Three decisions of the Supreme Court make it clear that the federal courts have no jurisdiction over the solution of representation disputes. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338.

[fol. 141] The facts of this case demonstrate the soundness of these three decisions and the impracticality of judicial interference in representation disputes over which Congress has conferred jurisdiction upon the National Mediation Board. 45 U.S.C. § 152. Prior to the merger of Capital into appellee, Capital was substantially the smaller of the two airlines. Immediately prior to the merger it had about 6500 non-management employees, about 6000 of whom were represented by labor organizations under six agreements. Appellee had 21,000 non-management employees, about 13,500 of whom were represented by nine labor organizations under twelve agreements. At the time of the merger there were approximately 2700 employees of Capital in the clerical craft or class represented by appellant and covered by the collective bargaining agreement here sought

to be enforced against appellee. The number of employees of appellee in this general craft or class numbered approximately 10,000, a part of whom had been organized pursuant to a National Mediation Board election and divided into two separate classifications. Immediately prior to the merger, approximately 2200 of the 10,000 employees of appellee in these classifications were represented by the International Association of Machinists under what is designated in the record as the I.A.M. Ramp and Stores Agreement. The remaining 7800 employees of appellee in this general class were not represented by a labor organization but were under uniform personnel regulations covering wage rates and fringe benefits.

After the merger the former Capital employees performing work covered under the I.A.M. Ramp and Stores Agreement came under that agreement, and about 530 of the 2700 Capital employees formerly represented by appellant are now represented by the International Association of Machinists. The remaining 2170 former Capital employees are now working alongside the 7800 unorganized employees of appellee in the same job classifications, and all are subject to the same pay schedules, benefits and working conditions established by appellee's personnel regulations.[2]

The record further disclosed that appellant seeks to represent the entire craft or class of employees of appellee in the clerical, office, stores, fleet and passenger service, [fol. 142] numbering some 12,170 employees, and has filed an application with the National Mediation Board asking for such certification under Section 2, Ninth, 45 U.S.C. § 152, Ninth, and there is now pending before the Court of Appeals of the District of Columbia Circuit a case involving an aspect of that proceeding, styled *United Air Lines* v. *National Mediation Board et al.*, Case No. 17,777.

If the District Court had exercised jurisdiction in this case and had granted the relief sought in the complaint,

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[2] Appellee contends that, as a result of coming under its personnel regulations, these former Capital employees have realized an improvement in their pay and related benefits. We agree with appellant that this is not a matter of legal significance in this case.

such a determination clearly could have applied to no more than the 2700 former Capital employees, constituting a minority of this class or craft of appellee's employees, 530 of whom are now represented by the International Association of Machinists. Such an impracticable result demonstrates the soundness of the holding of the Supreme Court in the three above-cited cases that there is to be no judicial intervention in such representation disputes.

By skillful pleading in this case, appellant has tried to avoid the consequences of these three Supreme Court decisions above cited, which clearly otherwise would be controlling. Appellant contends that the complaint does not ask for an adjudication of a dispute concerning representation rights, but involves a dispute between the representative of employees and a carrier concerning the latter's contract obligations. It is significant, however, that the first paragraph of the complaint, after stating that this is an action for declaratory judgment, proceeds to make the following averment:

> "It is brought because there now exists, as will hereinafter be more fully described, an actual controversy between the parties with respect to maintenance of a collective bargaining agreement executed pursuant to the provisions of the Railway Labor Act (45 U.S.C.A. Section 151 et seq.)."

Looking through form to substance, we agree with the District Court that, although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction "where 'validity' of the contract depends upon the merits of a representation dispute." *Division No. 14, Order of Radio Telegraphers* v. *Leighty*, 298 F.2d 17, 20 (C.A. 4).

Appellant relies strongly upon the fact that, prior to [fol. 143] instituting this action, it filed with the National Mediation Board an application pursuant to Section 5, Second, of the Railway Labor Act, 45 U.S.C. § 155, Second, for an interpretation of the application or meaning of the

collective bargaining agreement here sought to be enforced, but the Board found that it did not have jurisdiction to spell out the rights and obligations of the parties after the merger of Capital into appellee. It is argued that the dismissal of the complaint by the District Court leaves appellant without any forum in which to adjudicate appellee's obligations under appellant's agreement with Capital.

As hereinabove pointed out, appellant thereafter filed an application with the National Mediation Board asking for certification to represent the entire craft or class of appellee's employees in the clerical, office, stores, fleet and passenger service, and that proceeding is pending at the present time.

Regardless of what action may have been taken or may hereafter be taken by the National Mediation Board in this dispute, it is our opinion that the District Court was correct in holding that it did not have jurisdiction. As said by the Supreme Court in *General Committee* v. *M.-K.-T.*, 320 U.S. 323, 336-37:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. . . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. . . . If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. . . .
>
> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to

[fol. 144] be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. . . . Courts should not rush in where Congress has not chosen to tread."

In *Division No. 14, Order of Radio Telegraphers* v. *Leighty*, 298 F.2d 17, 19 (C. A. 4), involving a merger of railroads, the Court dismissed for lack of jurisdiction, saying:

"This trilogy of cases [referring to the three Supreme Court decisions above cited] authoritatively determines that judicial intervention in railway labor disputes is restricted to the narrowest scope; that large segments of this field remain subject to the voluntary processes of conciliation, mediation and arbitration; that particularly in representation disputes the adjudicatory function has been committed by Congress to the National Mediation Board. . . ."

All the cases relied upon by appellant have been considered carefully, including: *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515; *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F.2d 282 (C.A. 6), affirming 144 F. Supp. 869 (S.D. Ohio); *Commercial Telegraphers' Union* v. *Western Union Telegraph Co.*, 53 F. Supp. 90 (D.D.C.); and *Livingston* v. *John Wiley & Sons, Inc.*, 313 F.2d 52 (C.A. 2), cert. granted 373 U.S. 908. We find all these cases to be distinguishable from this case, since we hold that the instant case involves a representation dispute and not merely an action sounding in contract.

The action of the District Court in dismissing the complaint for lack of jurisdiction is affirmed.

[fol. 145] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 146]

SUPREME COURT OF THE UNITED STATES

No. 801, October Term, 1963

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Petitioner,

vs.

UNITED AIR LINES, INC.

ORDER ALLOWING CERTIORARI—April 20, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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No. [redacted]31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

UNITED AIR LINES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

UNITED AIR LINES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter called "the Brotherhood"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes* v. *United Air Lines* (Case No. 15,176) on December 17, 1963 (Appendix A hereto).

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 2a, is not yet reported. The opinion of the United States District Court for the Southern District of Ohio, Western Division at Cincinnati, printed in Appendix C hereto, *infra*, p. 10a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1963 (App. A, *infra*, p. 1a). The Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of the petitioner, the following questions are presented by this petition:

1. Did the United States District Court have jurisdiction of the subject matter of a complaint by the Brotherhood against United Air Lines, Inc., alleging that United's refusal to assume the obligations of the collective bargaining agreement of August 3, 1959, between Capital Airlines and the Brotherhood after the merger of Capital into United constituted a violation of that agreement, the Railway Labor Act, Delaware law, and the merger contract, and asking for a declaration of the rights of the parties with respect thereto and for injunctive relief against such violations?

2. Did the National Mediation Board have exclusive jurisdiction of the subject matter of the Brotherhood's complaint?

STATUTES INVOLVED

The statutory provisions involved are (1) Sections 1331, 1337, 2201 and 2202 of Title 28 of the United States Code (28 U.S.C.A., Sections 1331, 1337, 2201 and 2202); (2) Sections 2, First, 2, Seventh, 2, Ninth, 5, Second, 6 and 204 of the Railway Labor Act (45 U.S.C.A., Sections 152, First, Seventh, Ninth, 155, Second, 156 and 184); and (3) Section 328 of the Delaware General Corporation Law. They are printed in Appendix D, *infra*, p. 12a *et seq.*

STATEMENT

This litigation began with a complaint filed by the Brotherhood against United Air Lines in the United States District Court for the Southern District of Ohio, Western Division at Cincinnati, asking that Court to determine the legal rights of the parties with respect to a controversy between them concerning the application of a collective bargaining agreement, dated August 3, 1959, between the Brotherhood and Capital Airlines, to employees covered by such agreement who became employees of United Air Lines upon the merger of the two air carriers on June 1, 1961, and requesting the Court to issue an injunction to enjoin United from continuing a refusal to apply the provisions of such agreement to its employees. (R. 1-13.)[1] United Air Lines filed a motion asking, *inter alia*, the District Court to dismiss the complaint for lack of jurisdiction over the subject matter thereof on the ground that it involved a representation dispute subject to the exclusive jurisdiction of the National Mediation Board. (R. 18-20.) The District Court granted this motion

[1] Reference is to pages of the certified record in the Court of Appeals.

(App. C, *infra*, p. 11a) and the Court of Appeals affirmed (App. A, *infra*, p. 1a).

The collective bargaining agreement involved was executed pursuant to the Railway Labor Act (45 U.S. C.A., Sections 151 et seq.) by Capital Airlines and the Brotherhood as the certified representative of the craft or class of clerical, office, stores, fleet and passenger service employees of that air carrier effective August 1, 1948. The agreement was revised from time to time, the last revision becoming effective August 3, 1959. (R. 14.)

Article 1(b) of the agreement dealt with the contingency of a future merger involving the air carrier and read as follows:

> "All provisions of this agreement shall be binding upon the successors or assigns of the Company (i.e. Capital) and in case of a consolidation or merger, the Company (i.e. Capital) will notify the Brotherhood at least 90 days prior to such consolidation, or merger, and representatives of the Company (i.e. Capital) and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved."

On August 11, 1960, United and Capital, both Delaware corporations, entered into a merger agreement, providing for the merger of Capital into United as the surviving corporation. Section III, paragraph 1, of the merger agreement transferred to United all the rights, privileges, powers and franchises of Capital subject to all the restrictions, disabilities, and duties of each of the constituent corporations, as well as all of the property, real, personal and mixed of Capital. This section of the merger agreement also dealt with the ob-

ligations of United for the duties, liabilities and debts of Capital. The duties thus imposed upon United by the merger agreement for the debts, liabilities and duties of Capital read as follows: (R. 5, 6)[2]

> "United * * * shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations; * * * and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to United, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

At all times pertinent, Section 328 of the Delaware General Corporation Law provided, as follows: (App. D, p. 16a)

> "The liability of corporations * * * existing under the laws of this state * * * or the rights or remedies of * * * persons doing or transacting business with the corporation, shall not in any way be lessened or impaired by the * * * merger of two or more corporations * * *."

United and Capital filed a joint application with the Civil Aeronautics Board for approval of the merger agreement under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1378). The merger was approved by the Board on April 3, 1961. *United-Capital Merger Case* (Order No. E-16605, Docket No. 11699). The Board's approval was affirmed upon judicial review. *Northwest Airlines* v. *Civil Aeronautics Board*, 303 F. 2d 395 (D.C. Cir., 1962).

The merger was consummated on June 1, 1961. Approximately 2,700 former Capital employees covered by

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[2] Section 259 of the Delaware General Corporation Law imposed the same duties on United. (App. D, p. 16a).

the collective bargaining agreement between Capital and the Brotherhood became employees of United. (R. 11, 25.) Approximately 2,200 of these employees were clerical, office, fleet and passenger service employees unrepresented on United. Approximately 500 were ramp and stores employees represented on United by the International Association of Machinists (I.A.M.). The craft or class to which the 2,700 former Capital employees belonged numbered approximately 10,000 on United prior to the merger and was unrepresented. (R. 25.)

Before, during, and after the proceedings before the Board, the Brotherhood unsuccessfully sought by negotiation to persuade United to assume the obligations of the agreement as to the employees covered thereby. United refused on the ground that the agreement terminated automatically upon the consummation of the merger. (R. 6, 7, 8, 9, 42, 51-53.) Among the employee contract rights which United thus refused to recognize were those relating to seniority, pay, protection against arbitrary discipline and discharge, procedures for the adjustment of grievances and against arbitrary transfer, provisions for the health and safety of employees, and various other benefits such as sick leave allowances, overtime allowances, group insurance and pension benefits, and maintenance of union membership and check-off union dues. (R. 9.)

At no time has the Brotherhood sought to obtain representation rights for the craft or class on United by enforcement of the agreement, but only to protect contract rights of employees. (R. 58.)

The Brotherhood also exhausted all available administrative remedies.

It intervened in the C.A.B. proceedings and asked the Board to condition any approval of the merger

upon the assumption by United of the obligations of the agreement. (R. 7, 22.) United opposed on the ground that the agreement lawfully terminated upon consummation of the merger. The Board declined "to pass on the issue of whether United would be justified, as a matter of contract or labor law, in ignoring the agreement." It left the matter "as a problem to be worked out between the Companies and employees in accordance with regular procedures applicable to the matter of representation and agreement." (R. 23.)[3]

Since the revision of the agreement of August 3, 1959, containing Article 1(b), providing that the agreement should be binding on successors and assigns of Capital, was executed during mediation, the Brotherhood also applied to the National Mediation Board for an interpretation of the meaning or application of such Article pursuant to the provisions of Section 5, Second, of the Railway Labor Act (45 U.S.C.A., Section 155). (R. 8.) After hearing, at which United appeared and opposed the Brotherhood application (R. 8), the Mediation Board, on August 25, 1961, granted the application and issued an opinion interpreting Article 1(b) of the agreement. (R. 15-18.) This opinion found that the provisions of Article 1(b) of the collective bargaining agreement of August 3, 1959, between Capital and the Brotherhood were unambiguous and clearly meant precisely what they say. The Mediation Board's conclusion on the point read as follows: (R. 8, 17)

> "After reviewing the record of mediation in NMB Case No. A-6037, as well as the transcript of hear-

[3] The Brotherhood sought review of the Board decision in the United States Court of Appeals for the District of Columbia Circuit (Case No. 16,360—R. 23), but withdrew the petition when the Board made clear it had simply declined to act on the Brotherhood request. (R. 24.)

> ings and briefs submitted by the Brotherhood and United Air Lines, Inc., this Board is of the opinion that the language of Article 1(b) of the agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambiguous. In other words, the language means just what it says and we so find."

At the same time the Mediation Board found that it did not have jurisdiction to spell out the rights and obligations of the parties after the merger of Capital and United. The conclusions of the Mediation Board upon this point read as follows: (R. 17)

> "It must be pointed out, however, that the mediation agreement was executed on August 3, 1959, while the merger agreement between Capital and United was executed on August 11, 1960. Section 5, Second, of the Railway Labor Act, in our view, delegates no authority to this Board to interpret or construe the merger agreement, which is a document foreign to its processes. *The legal authorities cited by the Brotherhood may sustain its position, but this Board lacks jurisdiction to do anything more by interpretation than to construe the instrument produced through its mediatory function.* It is true that the language relied upon looks to the future, but can it be said that the quoted provision clothes this Board with authority to pass upon issues which arise out of subsequent developments such as mergers or consolidations? We think not. In sum, we find that the language is clear and unambiguous, but fail to find authority to spell out the rights and obligations of the parties in the situation presented here." (Emphasis supplied.)

Following the issuance of the Mediation Board's opinion, the Brotherhood made another effort to settle

the matter by negotiation with United upon the basis of the Mediation Board's decision. United refused to even meet with the Brotherhood to discuss the effect of the decision. (R. 9.)

Finally, the Brotherhood sought to obtain a determination of the rights of the employees involved through the processing of grievances pursuant to the provisions of Article 43 of the agreement which provides for a Board of Adjustment pursuant to the requirements of Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184) to render final and binding determinations on the application and interpretation of the agreement. However, United refused to accept and process these grievances, thus frustrating the Board of Adjustment arbitration process. (R. 11, 12.)

The Brotherhood, therefore, on November 9, 1961, filed its complaint in the District Court for declaratory and injunctive relief. (R. 2-13.)

The complaint raised clear-cut questions of law for adjudication. The Brotherhood alleged the existence of the collective bargaining agreement of August 3, 1959, between Capital and the Brotherhood containing the provision that such agreement "shall be binding upon the successors or assigns of the Company"; the provisions of the merger agreement between Capital and United requiring United to take over the liabilities and duties of Capital to the same extent as if such liabilities and duties had been incurred or contracted by United; the requirements of Delaware law to the same effect; the merger of Capital and United pursuant to such merger agreement and law; and the refusal of United to assume the liabilities and duties of said collective bargaining agreement between the Brotherhood

and Capital despite prolonged efforts of the Brotherhood to obtain this result. (R. 1-9.)

The complaint alleged that United's refusal to assume the obligations of said bargaining agreement of August 3, 1959, was unlawful because such refusal (1) violated the provisions of Article 1(b) of said collective bargaining agreement of August 3, 1959, between Capital and the Brotherhood; (2) violated the provisions of Section III, paragraph 1 of the merger agreement of August 11, 1960, between Capital and United; (3) violated the Delaware General Corporation Law, which requires United to assume the liabilities and duties of Capital; (4) violated the requirements of Section 2, First, of the Railway Labor Act (45 U.S.C.A., Section 152, First), which makes it the duty of all carriers to exert every reasonable effort to make and maintain agreements with their employees to settle all disputes arising out of the application of such agreements or otherwise; (5) violated the provisions of Section 2, Seventh, of the Railway Labor Act (45 U.S.C.A., Section 152, Seventh), which prohibits any carrier from changing rates of pay or working conditions of those employees as a class as embodied in collective bargaining agreements except in the manner prescribed in such agreements; and (6) violated the provisions of Section 6 of the Railway Labor Act (45 U.S.C.A., Section 156), because it involved the changing of rates of pay, rules or working conditions of United's employees embodied in the agreement of August 3, 1959, without complying with the procedures set forth in such section. (R. 9-12.)

It was also alleged that United's refusal to accept and process grievances of former Capital employees submitted to it in accordance with the provisions of said Brotherhood-Capital bargaining agreement of August 3, 1959, violated the requirements of Section

204 of the Railway Labor Act (45 U.S.C.A., Section 184), which requires that all disputes of employees growing out of grievances or out of interpretation of collective bargaining agreements are to be settled by a Board of Adjustment. (R. 11.)

In the proceedings in the District Court the Brotherhood and United agreed on all of the material facts alleged in the complaint. This is evidenced by the cross-motions for summary judgment filed by the parties. (R. 18, 48.)[4]

There was thus presented for adjudication of the District Court a clear-cut legal controversy falling within the jurisdiction of that Court under Sections 1331, 1337, 2201, and 2202 of Title 28 of the United States Code. (28 U.S.C.A., Sections 1331, 1337, 2201, and 2202). However, the District Court did not adjudicate this controversy, but granted United's alternative motion to dismiss the complaint on the ground that the Court was without jurisdiction of the subject matter of the complaint because it related to a dispute as to who are the representatives, under the Railway Labor Act, of employees of United, and that exclusive jurisdiction to determine such a dispute rests with the National Mediation Board under Section 2, Ninth, of the Railway Labor Act. (R. 75.)

On appeal, the Court of Appeals affirmed the action of the District Court in dismissing the complaint. (R. 1a.)

The Brotherhood has sought full representation rights for the entire craft or class of some 12,000 em-

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[4] United did introduce by way of affidavit (R. 20-41, 68) many conclusionary statements, which the Court of Appeals found were irrelevant to the issues raised by the complaint. (Appendix B, *infra*, page 6a, footnote 2.)

ployees of United Air Lines, of which the employees covered by the collective bargaining agreement here involved are a part, pursuant to an application filed with the National Mediation Board on August 24, 1962, for certification under the Railway Labor Act as representative of such craft or class. (Mediation Board Docket No. R-3590.) The Mediation Board has been unable to hold an election to determine the representative for the entire craft or class as a result of suits to enjoin such election brought by United Air Lines and by a group of employees of United Air Lines in the United States District Court for the District of Columbia which are now before the United States Court of Appeals for the District of Columbia Circuit for determination. *United Air Lines, Inc.* v. *National Mediation Board,* Case No. 17,777; *National Mediation Board, et al.* v. *Association for the Benefit of Non-Contract Employees,* Case No. 18,068; *and Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* Case No. 18,072.

REASONS FOR GRANTING WRIT

1. The Decision Below Deprives the Brotherhood of Any Forum in Which to Litigate the Important Federal Issue of Whether Its Agreement With Capital Survived the United-Capital Merger

The decision of the Court of Appeals deprives the Brotherhood and former Capital employees covered by the agreement of August 3, 1959, of any forum in which to adjudicate Brotherhood contention that United was [redacted] legally required under the Railway Labor Act, the provisions of the agreement, and the provisions of Delaware law and of the merger contract executed pursuant thereto to assume the obligations of such agreement as the surviving carrier of United's merger with Capital. The Civil Aeronautics Board

declined to decide this issue and the National Mediation Board, although agreeing with the Brotherhood's interpretation of the agreement, held that it did not have jurisdiction to determine the question. United itself frustrated the arbitration of the dispute under the Board of Adjustment provisions of the agreement by refusing to accept and process grievances thereunder.

The National Mediation Board, which both the District Court and the Court of Appeals held had exclusive jurisdiction of the dispute between the Brotherhood and United under Section 2, Ninth of the Railway Labor Act, clearly cannot determine the legal issue presented by the complaint under that Section.

The complaint (R. 12, 13) requested that the District Court (1) declare the legal rights of the parties with respect to the agreement of August 3, 1959, upon consummation of the merger of United and Capital; (2) declare that United is a successor or assign of Capital within the meaning of the provisions of Article 1(b) of such agreement; (3) declare that United assumed the liabilities and duties of the agreement by reason of the provisions of Section III, paragraph 1 of the merger contract between Capital and United; (4) declare that by operation of the laws of Delaware United is bound by the provisions of the agreement; and (5) issue an injunction enjoining United from continuing its refusal to apply the provisions of the agreement.

Under Section 2, Ninth, of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth) the Mediation Board has authority to grant only the following relief:

> "* * * to certify to both parties [i.e. the disputing unions], in writing * * * the name or names of the

individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter."

Action by the Mediation Board under Section 2, Ninth, would give none of the relief requested in the complaint. At most it would require United to bargain with the Brotherhood for an entirely new contract to cover the employees of United here involved, as well as other employees of United not involved, and, after months and perhaps years of such bargaining, including possibly even Presidential Emergency Board proceedings and a strike, would enable the Brotherhood to secure such a contract. On the other hand, the Brotherhood's position in this lawsuit is that regardless of what the ultimate representation might be for the employees covered by the Brotherhood-Capital bargaining agreement of August 3, 1959, United was required on June 1, 1961, when the merger was consummated to assume the obligations of that agreement and apply it to the former Capital employees governed by that agreement who then became employees of United until the agreement was changed in accordance with the provisions of the Railway Labor Act.

The rights of the former capital employees who are now United employees to the benefits of said agreement of August 3, 1959, on and after June 1, 1961, and their right to different benefits under a different contract negotiated sometime in the indefinite future following a Mediation Board proceeding under Section 2, Ninth (including a representation election) are clearly

not the same thing and call for an entirely different type of relief.

The fact that the Brotherhood seeks representation rights for the entire craft or class of United employees of which the former Capital employees here involved are a part before the National Mediation Board (see page 12 above) and the question of whether the Brotherhood does or does not secure such a certification has no relevancy to the determination of rights under the Brotherhood-Capital bargaining agreement of August 3, 1959. The failure of the Brotherhood to obtain such certification will not determine rights under that agreement on and after June 1, 1961, following the merger of Capital and United. Nor will issuance of such a certification by the Mediation Board determine any issue raised by the complaint or even automatically put such agreement into effect on United for any employee. All that the outcome of the certification proceeding will determine is whether or not United must in the future treat with the Brotherhood on behalf of the employees to which the certification extends. No obligation of United under said Brotherhood-Capital bargaining agreement of August 3, 1959, will be affected in any way.

It is submitted that the issue of whether or not a collective bargaining agreement between a union and an air carrier executed pursuant to the provisions of the Railway Labor Act survives a merger of that air carrier with another air carrier presents an important Federal question which deserves to be litigated upon the merits. It is also submitted that it is unfair to the Brotherhood and the employees involved to deprive them of any forum in which to obtain an adjudication of this issue.

2. The Decision of the Court of Appeals Is in Conflict With the Decision of Another Circuit

The decision below is in direct conflict with the decision of the Second Circuit in *Livingston* v. *John Wiley & Sons*, 313 F. 2d 52 (1963), *cert. granted* 373 U.S. 908 (Case No. 911).

The dispute between Wiley & Sons and the union concerned a collective bargaining agreement entered into between the union and Interscience Publishers, Inc., in 1945 and revised from time to time. On October 2, 1961, Interscience effected a consolidation with Wiley & Sons. The 80 employees of Interscience became employees of the Wiley Company which also had 300 other employees. Interscience before the consolidation of the Wiley company thereafter took the position that the agreement was automatically terminated for all purposes by the consolidation and that all rights of the union and the employees arising out of the agreement were at an end. The Wiley Company refused to recognize the seniority of the former Interscience employees or any other rights under the contract. Nor did it recognize the appellant union or any other union. Both before and after the consolidation took place the union involved took the position that the agreement was not terminated by the consolidation and certain rights of the employees had become vested. When the Wiley Company refused to agree with this position, the union brought suit in a United States District Court under Section 301 of the Labor-Managemnet Relations Act (29 U.S.C.A., Section 185) to compel the Wiley Company to arbitrate the dispute between the parties under the grievance and arbitration provisions of the agreement. The decision of the Second Circuit held that the collective bargaining agreement and the rights arising therefrom were not necessarily terminated by

the consolidation and that the Wiley Company must arbitrate the dispute as to the survival of the contract pursuant to the provisions thereof.

The Court of Appeals in the present case held that the decision in the *Wiley & Sons* case was distinguishable since "we hold that the instant case involves a representation dispute and not merely an action sounding in contract." (Appendix B, page 9a.) It is submitted that this attempted distinction involves circular reasoning and is completely erroneous. The only differences between the *Wiley & Sons* situation and the present case are (1) the collective bargaining agreement in the *Wiley & Sons* case, unlike the one here involved, did not provide that it was binding upon successors and assigns of the contracting company, and (2) the suit was under Section 301 of the Labor-Management Relations Act. The presence in the contract here involved of a provision making the agreement binding on successors and assigns of Capital makes even a stronger case than in the *Wiley & Sons* situation for the fact that the agreement survived the merger. The absence from the Railway Labor Act of a provision such as Section 301 of the Labor-Management Relations Act is of no significance in light of the decision of this Court in *International Association of Machinists* v. *Central Airlines,* 372 U.S. 682 (1963). This is particularly true in light of the fact that one of the provisions of the collective bargaining agreement here involved, which the Brotherhood seeks to enforce, is a Section 204 Railway Labor Act contract which this Court held in the *Machinists* case (page 692) "like the Labor-Management Relations Act Section 301 contract, is a Federal contract and is therefore governed and enforceable by Federal law in the Federal courts."

If the Federal courts had jurisdiction to entertain the suit in the *Wiley & Sons* case, the District Court clearly had jurisdiction to entertain the suit by the Brotherhood against United. United suggested to the Court of Appeals that the present case differed from the *Wiley & Sons* case because of the finding on page 58 of the Second Circuit decision that no rival union was there involved whose rights would be interfered with by a pressing of the employees' claims while here there was a rival union, i.e., the I.A.M. because the latter represents approximately 500 of the 2,700 Capital employees taken over by United. Obviously, at best, this argument would be applicable only to those employees and not to the other 2200 former Capital employees involved. In addition, the Brotherhood did not assert any right to override any agreement made by the IAM with United covering the 500 employees in question. The IAM clearly recognized this fact when it advised that there was "no dispute between the Brotherhood of Railway Clerks and the IAM with respect to the representation of employees and, accordingly, the IAM has no interest and no desire to be a party to the litigation." (R. 67.)

3. The Decision Below Conflicts With Decisions of This Court

The Brotherhood submits that the decision below is in direct conflict with the decision of this Court in *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682, referred to above. In that case the IAM brought suit to enforce a grievance decision made under the provisions of a collective bargaining agreement executed pursuant to the requirements of Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184). The decision by this Court reversed the judgment of

the Court of Appeals for the Fifth Circuit (295 F. 2d 209) holding that the District Court had no jurisdiction to entertain the complaint because there was no Federal cause of action. This Court held that it is Federal law which determines whether the contract was valid and enforceable according to its terms. The instant suit is to enforce an agreement between the parties executed pursuant to the provisions of the Railway Labor Act, including Article 43 thereof, which provides for a creation of a Board of Adjustment required by the provisions of Section 204 of the statute. (Exhibit A to the Complaint, page 43, affixed to R. 14.)

4. The Court of Appeals Erred in Holding That the Suit by the Brotherhood Involves a Representation Dispute

Both the District Court and the Court of Appeals held that the National Mediation Board has exclusive jurisdiction under Section 2, Ninth, of the Railway Labor Act of the subject matter of the Brotherhood complaint because it involves a representation dispute. (R. 75; Appendix B, page 9a.) This holding is not only erroneous but involves a misinterpretation of the Railway Labor Act.[5] Section 2, Ninth, is applicable only to a dispute "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter." Neither the decision of the District Court nor the decision of the Court of Appeals

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[5] The decision of the Court of Appeals is also factually in error when it states (Appendix B, p. 3a) that it is not contended that, by reason of the provisions of Section III, paragraph 1 of the merger agreement between Capital and United, United intended to assume the obligations of Capital under any of its collective bargaining agreements. Paragraphs 10 and 20 of the complaint (R. 5, 6, 9, 10) specifically allege such an assumption under the merger contract of the obligations of the collective bargaining agreement.

explains who are the parties to the representation dispute which they find to be present. Indeed, the District Court seems to have invented a new type of dispute other than those involved in the three cases upon which both it and the Court of Appeals rely. (R. 74.) Certainly there is no such dispute among the 2200 employees of United who are unrepresented on the property of that carrier and whose rights under the collective bargaining agreement with Capital the complaint seeks to enforce, nor is there any representation dispute between the IAM and the Brotherhood with respect to the approximately 500 former Capital employees covered by the Brotherhood agreement with that carrier who are represented on United by the IAM. The Brotherhood did not seek to have the District Court adjudicate that it is the duly designated representative under the Railway Labor Act of these 500 employees. The Brotherhood sought only by its complaint to establish that United was under a duty to assume the obligations of the Brotherhood-Capital agreement on and after June 1, 1961, as to all former employees of Capital covered by that agreement and that rights of such employees of United began to accrue on that date. It is clear that United and the IAM had a right after June 1, 1961, to negotiate a change in the agreement of August 3, 1959, between Capital and the Brotherhood governing the 500 ramp and stores employees in accordance with the requirements of the Railway Labor Act. (See *infra*, p. 21.)

The decision of the District Court which was affirmed by the Court of Appeals equates the contract rights of the employees involved with representation rights under the Railway Labor Act. This is clearly in error.

Representation rights under that statute flow out of Sections 2, Third, and Fourth and arise out of designations made by the employees certified by the Mediation Board. Contract rights, on the other hand, are based on Sections 2, First, and Seventh, and Section 6 of the statute, and the law governing contracts. Once contract rights are established under a collective bargaining agreement executed pursuant to the Railway Labor Act they may be extinguished only in accordance with the terms of the contract and Section 6 of the statute. Even a change in representation has no effect upon contract rights. The National Mediation Board has pointed out this fact in its official publication "Administration of the Railway Labor Act by the National Mediation Board, 1934-1957". At pages 24 and 25, the Mediation Board states in pertinent part as follows:

> "*Change of representatives under existing agreements.*—When there is an agreement in effect between a carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management under the existing agreement. *If a change in the agreement is desired, the new representatives are requird to give due notice of such desired change as provided by the agreement or by the Railway Labor Act.* Conferences must then be held to agree on the changes exactly as if the original representatives had been continued. *The purpose of such a policy is to emphasize a principle of the*

> *Railway Labor Act that agreements are between the employees and the carrier, and that the change of an employee representative does not automatically change the contents of an agreement.*" (Emphasis supplied.)

Thus, rights arising out of a collective bargaining agreement under the Railway Labor Act survive a change in the representative who negotiates the agreement.

The inherent distinction between contract rights and representation is also demonstrated by numerous examples of the assumpiton of the obligations of collective bargaining agreements in railroad and air carrier mergers without regard to questions of representation. *City of Nashville, Tennessee* v. *United States,* 155 F. Supp. 98, 105 (U.S.D.C. M.D. Tenn., Nashville Div., 1957), aff'd *per curiam* 355 U.S. 63. At page 105 of the opinion of the District Court in that case, approving the merger of the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, the Court spoke as follows:

> "The approval by this court of the order of the Interstate Commerce Commission of March 1, 1957, approving the merger upon the conditions therein stated, is based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in finding of fact Number 15."

The assurances referred to as set forth in Finding No. 15 read in pertinent part as follows (155 F. Supp. at 103):

> "The attorney for the Louisville and Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company stated that, in the merger agreement between the railroads, it is expressly provided that the Louisville and Nashville will assume any and all obligations and contracts of the Nashville, Chattanooga & St. Louis Railway Company, *including its negotiated union bargaining agreements.*" (Emphasis theirs.)

Examples of a similar assumption of contract obligations in airline mergers appear in the record with respect to the *Colonial-Eastern Merger* and the *Alaska Coastal Airlines-Ellis Air Lines Merger* (R. 59-66).

The decision of the Court of Appeals also adverted to practical difficulties in applying the agreement to less than an entire craft or class of United employees. Article 1(b) of the agreement, quoted above, page 4, provides a means of meeting any such problem in the agreement of the parties to meet and negotiate for "the procedure to be followed and the protection to be afforded the employees involved." In addition, any such difficulties did not prevent the Second Circuit in the *Wiley & Sons* case from holding that the agreement there involved did not automatically terminate upon a consolidation. Moreover, that Court believed that any such problem could be taken care of by the arbitrator. 313 F. 2d at 59, footnote 5. Likewise, in the present case if the parties were unable to meet any such problem through negotiations under Article 1(b) the problems could be determined by arbitration before an Adjustment Board under Article 43.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1964

APPENDIX A

Judgment

(Filed December 17, 1963)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ HARRY PHILLIPS,
United States Circuit Judge.

APPENDIX B

No. 15176

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided December 17, 1963.

Before MILLER, O'SULLIVAN and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge. This case arises out of the merger of Capital Airlines, Inc. into United Airlines, appellee herein, on June 1, 1961. The facts concerning the background and details of this merger are set forth in *Northwest Airlines, Inc.* v. *C.A.B.*, 303 F.2d 395 (C.A. D.C.), affirming the approval of the merger by the Civil Aeronautics Board.

In May 1947 appellant was certified by the National Mediation Board pursuant to the Railway Labor Act,[1] 45

[1] The Railway Labor Act, first adopted in 1926, was extended to air carriers in 1936 by the additions of Title II, 45 U.S.C. § 181 et seq, which applies all the provisions of the Act (with certain exceptions not involved here) to "every common carrier by air . . . and . . . person who performs any work as an employee . . . of such carrier." 45 U.S.C. § 181.

U.S.C. § 151 et seq, as the designated bargaining agent for the employees of Capital in the craft or class of clerical, office, stores, fleet and passenger service. Pursuant to this certification, appellant and Capital entered into a collective bargaining agreement effective August 1, 1948, which, with certain revisions, was in effect immediately prior to the time Capital was merged into appellee.

Article 1(b) of this collective bargaining agreement contained the following provision:

> "All provisions of this agreement shall be binding upon the successors or assigns of the Company (i.e. Capital) and in case of a consolidation or merger, the Company (i.e. Capital) will notify the Brotherhood at least 90 days prior to such consolidation, or merger, and representatives of the Company (i.e. Capital) and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved."

The merger agreement between appellee and Capital provided as follows:

> "United . . . shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations; . . . and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to United, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

Appellee announced from the outset of the merger proceedings that it would not assume or be bound by any of Capital's labor agreements. It is not contended that by the above-quoted language of the merger agreement appellee intended to assume the obligations of Capital under any of its collective bargaining agreements, or that appellee at any time made any representations to the effect that it as successor would be bound by the agreement between appellant and Capital.

Appellant participated as an intervenor in the proceedings before the Civil Aeronautics Board, urging that, if that Board should approve the proposed merger, this collective bargaining agreement be imposed upon appellee as a condition thereof. The Board refused to impose this condition in its order approving the merger, stating that this was a matter to be worked out "in accordance with regular procedures applicable to the matter of representation and agreement." Appellant appealed from the Board's decision to the Court of Appeals for the District of Columbia, but thereafter withdrew its appeal with the acquiescence of the other parties.

This suit was filed by appellant seeking a declaration that appellee was bound by the terms of appellant's collective bargaining agreement with Capital and to enjoin appellee from refusing to apply that agreement to those former employees of Capital covered thereby who became employees of appellee upon consummation of the merger. Appellee moved to dismiss the complaint or for summary judgment upon the following grounds: The cause involved a dispute as to who were the representatives under the Railway Labor Act of certain of its employees and hence exclusive jurisdiction lay with the National Mediation Board; if the requested relief were granted appellee would be required to treat with a bargaining representative for a minority of a craft or class, contrary to the provisions of the Railway Labor Act; that the agreement between appellant and Capital revealed on its face that it could not be legally or practically applied to less than an entire craft or class; that another labor organization had representation rights for part of the group upon which appellant was seeking to impose its agreement with Capital and hence this other labor organization was an indispensable party to the action.

Appellant filed a cross-motion for summary judgment upon the ground that the material facts alleged in the

complaint were not in dispute and that appellant on such undisputed facts is entitled to judgment as a matter of law.

The District Court denied both motions for summary judgment for lack of jurisdiction and granted appellee's motion to dismiss the complaint, holding that the case relates to a dispute as to who are representatives under the Railway Labor Act of certain employees of appellee and that exclusive jurisdiction to determine such a dispute vests with the National Mediation Board under the provisions of Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 152, Ninth.

We affirm the District Court.

Three decisions of the Supreme Court make it clear that the federal courts have no jurisdiction over the solution of representation disputes. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338.

The facts of this case demonstrate the soundness of these three decisions and the impracticality of judicial interference in representation disputes over which Congress has conferred jurisdiction upon the National Mediation Board. 45 U.S.C. § 152. Prior to the merger of Capital into appellee, Capital was substantially the smaller of the two airlines. Immediately prior to the merger it had about 6500 non-management employees, about 6000 of whom were represented by labor organizations under six agreements. Appellee had 21,000 non-management employees, about 13,500 of whom were represented by nine labor organizations under twelve agreements. At the time of the merger there were approximately 2700 employees of Capital in the clerical craft or class represented by appellant and covered by the collective bargaining agreement here sought to be enforced against appellee. The number of employees of

appellee in this general craft or class numbered approximately 10,000, a part of whom had been organized pursuant to a National Mediation Board election and divided into two separate classifications. Immediately prior to the merger, approximately 2200 of the 10,000 employees of appellee in these classifications were represented by the International Association of Machinists under what is designated in the record as the I.A.M. Ramp and Stores Agreement. The remaining 7800 employees of appellee in this general class were not represented by a labor organization but were under uniform personnel regulations covering wage rates and fringe benefits.

After the merger the former Capital employees performing work covered under the I.A.M. Ramp and Stores Agreement came under that agreement, and about 530 of the 2700 Capital employees formerly represented by appellant are now represented by the International Association of Machinists. The remaining 2170 former Capital employees are now working alongside the 7800 unorganized employees of appellee in the same job classifications, and all are subject to the same pay schedules, benefits and working conditions established by appellee's personnel regulations.[2]

The record further disclosed that appellant seeks to represent the entire craft or class of employees of appellee in the clerical, office, stores, fleet and passenger service, numbering some 12,170 employees, and has filed an application with the National Mediation Board asking for such certification under Section 2, Ninth, 45 U.S.C. § 152, Ninth, and there is now pending before the Court of Appeals of the District of Columbia Circuit a case involving an aspect of that proceeding, styled *United Air Lines* v. *National Mediation Board et al.*, Case No. 17,777.

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[2] Appellee contends that, as a result of coming under its personnel regulations, these former Capital employees have realized an improvement in their pay and related benefits. We agree with appellant that this is not a matter of legal significance in this case.

If the District Court had exercised jurisdiction in this case and had granted the relief sought in the complaint, such a determination clearly could have applied to no more than the 2700 former Capital employees, constituting a minority of this class or craft of appellee's employees, 530 of whom are now represented by the International Association of Machinists. Such an impractical result demonstrates the soundness of the holding of the Supreme Court in the three above-cited cases that there is to be no judicial intervention in such representation disputes.

By skillful pleading in this case, appellant has tried to avoid the consequences of these three Supreme Court decisions above cited, which clearly otherwise would be controlling. Appellant contends that the complaint does not ask for an adjudication of a dispute concerning representation rights, but involves a dispute between the representative of employees and a carrier concerning the latter's contract obligations. It is significant, however, that the first paragraph of the complaint, after stating that this is an action for declaratory judgment, proceeds to make the following averment;

> "It is brought because there now exists, as will hereinafter be more fully described, an actual controversy between the parties with respect to maintenance of a collective bargaining agreement executed pursuant to the provisions of the Railway Labor Act (45 U.S.C.A. Section 151 et seq.)."

Looking through form to substance, we agree with the District Court that, although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction "where 'validity' of the contract depends upon the merits of a representation dispute." *Division No. 14, Order of Radio Telegraphers* v. *Leighty*, 298 F.2d 17, 20 (C.A. 4).

Appellant relies strongly upon the fact that, prior to instituting this action, it filed with the National Mediation Board an application pursuant to Section 5, Second, of the Railway Labor Act, 45 U.S.C. § 155, Second, for an interpretation of the application or meaning of the collective bargaining agreement here sought to be enforced, but the Board found that it did not have jurisdiction to spell out the rights and obligations of the parties after the merger of Capital into appellee. It is argued that the dismissal of the complaint by the District Court leaves appellant without any forum in which to adjudicate appellee's obligations under appellant's agreement with Capital.

As hereinabove pointed out, appellant thereafter filed an application with the National Mediation Board asking for certification to represent the entire craft or class of appellee's employees in the clerical, office, stores, fleet and passenger service, and that proceeding is pending at the present time.

Regardless of what action may have been taken or may hereafter be taken by the National Mediation Board in this dispute, it is our opinion that the District Court was correct in holding that it did not have jurisdiction. As said by the Supreme Court in *General Committee* v. *M.-K.-T.*, 320 U.S. 323, 336-37:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. . . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. . . . If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. . . .
>
> "In view of the pattern of this legislation and its history the command of the Act should be explicit and

> the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. . . . Courts should not rush in where Congress has not chosen to tread."

In *Division No. 14, Order of Radio Telegraphers* v. *Leighty*, 298 F.2d 17, 19 (C.A. 4), involving a merger of railroads, the Court dismissed for lack of jurisdiction, saying:

> "This trilogy of cases [referring to the three Supreme Court decisions above cited] authoritatively determines that judicial intervention in railway labor disputes is restricted to the narrowest scope; that large segments of this field remain subject to the voluntary processes of conciliation, mediation and arbitration; that particularly in representation disputes the adjudicatory function has been committed by Congress to the National Mediation Board. . . ."

All the cases relied upon by appellant have been considered carefully, including: *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Virginian Railway Co.* v. *System Federation*, 300 L.S. 515; *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F.2d 282 (C.A. 6), affirming 144 F. Supp. 869 (S.D. Ohio); *Commercial Telegraphers' Union* v. *Western Union Telegraph Co.*, 53 F. Supp. 90 (D.D.C.); and *Livingston* v. *John Wiley & Sons, Inc.*, 313 F.2d 52 (C.A. 2), cert. granted 373 U.S. 908. We find all these cases to be distinguishable from this case, since we hold that the instant case involves a representation dispute and not merely an action sounding in contract.

The action of the District Court in dismissing the complaint for lack of jurisdiction is affirmed.

APPENDIX C

Memorandum Opinion of District Court

(Filed August 9, 1962)

Although the defendant's motion is alternative in form, for present purposes it may be stated that this case has been submitted to the Court on cross motions for summary judgment; the alternative request of the defendant's motion is that the action be dismissed for lack of jurisdiction. Each party has filed extensive, even exhaustive, memoranda in support of its own position and in opposition to that urged by the other, and has filed protracted and detailed affidavits. Additionally, careful and capable oral arguments were made, and it might be stated that the transcript of that argument has been reread since the other filings and authorities have been studied.

After consideration of the various contentions presented, few of which can be summarily disposed of, it has been concluded that the first ground set forth in the defendant's motion provides an obstacle to the taking of jurisdiction by this court. That ground is stated in the motion as follows:

> "1. The Court is without jurisdiction of this cause since it relates to a dispute as to who are the representatives under the Railway Labor Act of certain of the employees of United Air Lines, Inc. Exclusive jurisdiction to determine such a dispute vests with the National Mediation Board under the provisions of Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth)."

Despite some possible clouding of this point, and perhaps even some attempted shift of position, on the part of the plaintiff, the fact remains that its Complaint clearly states that this action was brought because of the existence of "an actual controversy" under a "collective bargaining agreement executed pursuant to the provisions of the Railway Labor Act (45 U.S.C. Sections 151 et seq.)". After having so brought the action, plaintiff now contends (p. 32, plaintiff's first brief) that the issue here presented is "for the courts under the law of contracts . . . and not

an issue within the competence of the Mediation Board under the Railway Labor Act."

Under this theory, and upon the contention that this suit is not concerned with either a "representation dispute" or a "jurisdictional dispute between labor organizations," plaintiff seeks to avoid the consequences of three 1943 decisions by the Supreme Court which would otherwise be controlling. (*Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *M.K.T.R. Railroad Co.*, 320 U.S. 323; and *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338). Without here holding that this action fails to fall within either of those two categories nor that the triune of 1943 cases are limited thereto, we find them to have present application.

Plaintiff has urged (p. 7, second brief) that *Randolph* v. *Missouri, K. & T. R. Co.*, 85 F. Supp. 846 (D.C. Mo., 1949), is in point, but it appears to be distinguishable on the facts. It is true that this plaintiff had earlier attempted to have the National Mediation Board declare that it was the collective bargaining representative of certain of defendant's employees by requesting an interpretation of a mediation agreement (Complaint, Exhibit B). However, the plaintiff has never requested that the Board investigate any dispute as to who has been chosen by a majority of the employees as their authorized representative, nor has the plaintiff requested the Board to make a bargaining agent certification. The latter two requests are among those within the jurisdiction of the National Mediation Board (45 U.S.C. Section 152, Ninth). Hence the rationale of the *Randolph* case has no application here.

In spite of the fact that anything said following the above expression of our conclusion is obiter dictum, we feel constrained to observe that despite its own protestations we fail to see how this action could be consummated without joinder of the International Association of Machinists.

Defendant's motion to dismiss for lack of jurisdiction is found to be well taken.

APPENDIX D

STATUTES INVOLVED

Judicial Code

Sections 1331, 1337, 2201 and 2202 of Title 28 of the United States Code (28 U.S.C.A., Sections 1331, 1337, 2201 and 2202):

Section 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

* * * * *

Section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

* * * * *

Section 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

* * * * *

Section 2202:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Railway Labor Act

Sections 2, First; 2, Seventh; 2, Ninth; 5, Second; Section 6 and Section 204 of the Railway Labor Act (45 U.S.C.A., Sections 152, First; 152, Seventh; 152, Ninth; 155, Second; 156 and 184):

Section 2, First:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * * * *

Section 2, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

* * * * *

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a

secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

* * * * *

Section 5, Second:

"Second. In any case in which a controversy arises over the meaning of the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

* * * * *

Section 6:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto,

or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

* * * * *

Section 204:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representa-

tives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

Delaware Statutes

Section 328 of the Delaware General Corporation Law (8 Del. C., Section 328):

"§ 328. Liability of corporation, etc., impairment by certain transactions.

"The liability of corporations created under this chapter, or existing under the laws of this State, or the stockholders, directors or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with the corporation, shall not in any way be lessened or impaired by the sale thereof, or by the increase or decrease in the capital stock of any such corporation, or by the consolidation or merger of two or more corporations or by any change or amendment in the certificate of incorporation."

* * * * *

Section 259 (a) of the Delaware General Corporation Law (8 Del. C, Section 259 (a)):

"§ 259. Status, rights, liabilities, etc., of constituent and surviving corporations following merger or consolidation.

"When an agreement of consolidation or merger shall have been signed, acknowledged, filed and recorded, in accordance with the requirements of this subchapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, party to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said

agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so consolidated or merged, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, including in the case of banks or trust companies, without any order or any action on the part of any court or otherwise, appointments, designations, and nominations and all other rights and interests as trustee executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of lunatics and in every other fiduciary capacity, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 31

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Petitioner,

vs.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 801.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Petitioner,

vs.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 325 F. 2d 576. The opinion of the District Court is not reported. The opinions are printed as appendices to the petition.

QUESTION PRESENTED.

Petitioner labor organization represented certain employees of Capital Airlines, Inc., under a labor agreement. Upon the merger of Capital into respondent United Air Lines, Inc., these employees were functionally integrated into the larger comparable group of United employees,

part of whom were represented by a different labor organization. Under these circumstances does an action to declare United bound by the terms of the Capital labor agreement for the former Capital employees involve a representation and jurisdictional dispute under the Railway Labor Act with respect to which the federal courts do not have jurisdiction?

STATEMENT.

This proceeding arose out of the merger of Capital Airlines, Inc. into respondent, United Air Lines, Inc., on June 1, 1961, pursuant to order of the Civil Aeronautics Board ("C. A. B."), the federal agency whose approval is required under the Federal Aviation Act of 1958 (49 U. S. C. §§ 1301-1542) before a merger can be concluded in the air transport industry. The order of the C. A. B. was affirmed by the Court of Appeals in *Northwest Airlines, Inc.* v. *C. A. B.*, 303 F. 2d 395 (C. A. D. C., 1962).

The Federal Aviation Act authorizes the C. A. B. to condition its approval of a merger upon such terms and conditions as it shall find to be just and reasonable. (Section 408(b), Federal Aviation Act; 49 U. S. C., § 1378(b)).

During the course of the proceedings before the C. A. B., petitioner Brotherhood—which participated as an intervenor—asked the C. A. B. to impose on United, as a condition of the merger, a collective bargaining agreement which Brotherhood then had with Capital respecting a group of Capital employees. United had advised the C. A. B. that it did not intend to assume any Capital labor agreements. The C. A. B. refused to impose the condition requested by Brotherhood, stating in its opinion accompanying its order approving the merger:

> ". . . Capital and United should jointly or severally give at least forty-five days' notice to the employees

> who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement. This would then place the matter as a problem to be worked out between the companies and employees in accordance with regular procedures applicable to the matter of representation and agreement."

Such a notice was posted by United and Capital. (R. 21-23.)

Brotherhood petitioned the Court of Appeals for the District of Columbia to review the order of the C. A. B. insofar as it refused to impose on United its labor agreement with Capital, and moved that Court to stay the merger pending review. (C. A. D. C., Case No. 16,360.) The motion was denied in May, 1961, shortly before the June 1 effective date of the merger. After requests for extension of time and indefinite postponement of the hearing on the merits in the Court of Appeals, Brotherhood withdrew its petition on November 6, 1961. (R. 23-24.)

Three days later, on November 9, 1961, this action was initiated by Brotherhood by the filing of a complaint seeking a declaration that United was bound to the terms of the Brotherhood-Capital labor agreement, and to enjoin United from refusing to apply that agreement to "employees of Capital covered by that agreement who became employees of United upon consummation of the merger." (R. 2-13.)

United then moved to dismiss the complaint or for summary judgment. The grounds for this motion were: the cause involved a dispute as to who were the representatives under the Railway Labor Act of certain of its employees and hence exclusive jurisdiction lay with the National Mediation Board; if the requested relief were granted United would be required to treat with a bargaining representative for a minority of a craft or class, contrary to the provisions of the Railway Labor Act; that

the Brotherhood-Capital agreement revealed on its face that it could not be legally or practically applied to less than an entire craft or class; that another labor organization had representation rights for part of the group upon which Brotherhood was seeking to impose its agreement with Capital and hence this other labor organization was an indispensable party to the action. (R. 18-20.)

The District Court granted United's motion to dismiss, finding in its Order that "this Court is without jurisdiction over the subject matter for the reason that the same relates to a dispute as to who are the representatives under the Railway Labor Act of certain of the employees of the defendant * * * and that exclusive jurisdiction of said dispute is vested in the National Mediation Board. * * *" (R. 75.)

The Court of Appeals affirmed, relying primarily on the decision of this Court in *General Committee, etc.* v. *M.-K.-T. R. Co.*, 320 U. S. 323 (1943). (App. B. to Petition.)

The facts upon which the Court of Appeals based its determination are not in dispute.

Capital was by far the smaller of the two merged carriers. Immediately prior to the merger it had about 6,500 non-management employees and about 6,000 of these were represented by labor organizations under six agreements. United had 21,000 non-management employees, about 13,500 of these being represented by nine labor organizations under twelve agreements. (R. 21.)

Since it was the intention of United to integrate functionally Capital's operations into its own (rather than operate the former Capital system as a separate division), it was obviously necessary to have uniform pay scales and working conditions for all employees doing the same kind of work, side by side. This integration was essential because of the precarious financial position of Capital and

the overlapping of some of its routes with those of United. United determined that because it was to be the surviving carrier and because of the requirements of the Railway Labor Act, the terms and conditions of employment in effect at United prior to the merger would be applied to all employees—United and former Capital—after the merger. This meant that Capital employees falling within classifications represented by a labor organization at United would come under the labor agreement applicable to that classification, and those within classifications not represented by a labor organization at United would be subject to the uniform United personnel regulations which establish rates of pay and working conditions applicable to United employees in such classifications. (R. 21-22.)

The C. A. B. was advised of United's intention in this respect early in the merger proceedings. Many labor organizations, including Brotherhood, participated in the proceeding, and although the effect of United's position was that none of Capital's six labor agreements would survive the merger, only Brotherhood objected. As already noted, Brotherhood requested the C. A. B. to impose its contract with Capital on United as a condition of the merger. (R. 22.) It was thus clear from the outset that United did not intend voluntarily or contractually to assume the Brotherhood contract by reason of the United-Capital merger agreement. (See opinion of Court of Appeals below, Appendix B to Petition, page 3a.)

The classification of employees which Brotherhood represented at Capital was known as the craft or class of clerical, office, stores, fleet and passenger service employees, sometimes referred to as the clerical craft or class. Brotherhood had been certified as the collective representative of this craft or class at Capital pursuant to a National Mediation Board ("N. M. B.") election held in 1947. Capital maintained collective bargaining relations

with the Brotherhood continously from the time of its certification until the United-Capital merger. (R. 43.)

The Capital-Brotherhood agreement in effect immediately prior to the merger (R. 14)—the agreement Brotherhood sought to impose on United in this proceeding—recited the 1947 N. M. B. election and certification of Brotherhood as the basis for its recognition by Capital as the "sole and exclusive bargaining agent for all employees" of Capital in the clerical craft or class. (Agreement, Article I(a).)

Immediately prior to the merger there were approximately 2,700 employees at Capital in the clerical craft or class represented by Brotherhood as sole and exclusive bargaining agent and covered under this Agreement. The comparable group at United numbered approximately 10,000; the United group had never been organized into a single craft or class as had been the case at Capital, although part of this group had been organized pursuant to a 1945 National Mediation Board election at United. As a result of this election two separate groups were established for collective bargaining purposes, the cargo clerks and handlers, and the stockroom attendants. At Capital, employees performing work in these classifications were included in the clerical craft or class represented by Brotherhood.

Since 1948 these two separate classifications have been represented at United by the International Association of Machinists ("IAM"). The cargo clerks and handlers are now known as ramp employees and the stockroom attendants are known as stores employees. These two separate groups are now under a single collective bargaining agreement which United maintains with the IAM known as the "Ramp and Stores Agreement." (R. 24-25.)

Immediately prior to the merger, 2,200 of the 10,000

employees of United in the grouping comparable to the clerical craft at Capital were under the IAM Ramp and Stores Agreement. The remaining approximately 7,800 employees were not represented by a labor organization and were covered under United's personnel regulations. (R. 25.)

Upon the consummation of the merger, the former Capital employees performing work covered under the United-IAM Ramp and Stores Agreement came under that Agreement. Consequently about 530 of the 2,700 former Capital employees who were represented by the Brotherhood at Capital are now represented by the IAM at United. Letters of Agreement relating to the integration of United and Capital employees under the Ramp and Stores Agreement were entered into between United and the IAM on June 23, 1961. (R. 25-26.)

The remaining 2,170 former Capital employees who were represented by Brotherhood at Capital and who are not under a collective bargaining agreement at United have been integrated into United's system and are now working side by side with the 7,800 unorganized United employees in the same job classifications, and all are subject to the same pay schedules, benefits and working conditions established under United's uniform personnel regulations. (R. 26.)

As a result of coming under United's uniform personnel regulations, these Capital employees who were formerly under the Capital-Brotherhood clerical agreement have realized an improvement in their pay and related benefits. The overall wage scales at United at this time were higher than those which existed at Capital prior to the merger. The maximum vacation for the employees at Capital under the Brotherhood agreement was three weeks per year after 12 years of service—a level of vacation reached at United after ten years, where the maximum vacation is 20 days per year; at Capital these employees

paid for the entire cost of their uniforms—United paid one-half of the initial cost; United offered these employees a stock purchase plan in which it matches 15% of the employee contribution—Capital had no such plan; United paid one-half of the cost of accident and sickness insurance for these employees—Capital paid none; they received $5,000 of free group life insurance from United and the option to purchase additional life insurance to $10,000—Capital offered them an option to purchase $7,000 of insurance and provided none free; these employees became eligible to participate in United's retirement income plan which provides more liberal benefits than were available at Capital. (R. 26-27.) In addition, these former Capital employees were given full seniority credit for their prior service with Capital. (R. 27.)

Although the C. A. B. declined to require United to assume the Capital-Brotherhood clerical agreement, it did impose labor protective provisions as a condition of its approval of the merger. These provided additional protection to the rights of these employees. Among these were pay adjustments for employees who were placed in a worse pay position as a result of the merger; reimbursement for expenses incident to transfers resulting from the merger; arbitration machinery to resolve disputes arising under the protective provisions. (R. 33-40.)

Finally, the C. A. B. reserved jurisdiction in its order approving the merger to "make such amendments, modifications, and additions to the protective labor conditions • • • as circumstances may require." (R. 32.)

These benefits and protections which the former Capital employees received as a result of the merger may be contrasted with the position they would have been in had the merger not taken place. The Court of Appeals which affirmed the C. A. B. order found that the merger was

an "emergency crash measure," and quoted from the C. A. B. opinion that "Capital is financially *in extremis* and will not survive if the merger is disapproved." *Northwest Airlines* v. *C. A. B.*, 303 F. 2d 395, 397, 398. (C. A. D. C., 1962.)

Two weeks after the district court issued its opinion dismissing the complaint for lack of jurisdiction, Brotherhood filed its application with the National Mediation Board seeking representation rights for the same craft or class it had represented at Capital, with certain exceptions. A dispute developed between the IAM and Brotherhood over their respective interests, and subsequently United filed a suit to restrain the N. M. B. from proceeding with an election on the Brotherhood application unless it accorded United status as a party in interest on the issue of the appropriateness of the craft or class and unless the N. M. B. would use a ballot which would allow employees the alternative of voting for no representation. United's complaint was dismissed, and it appealed this dismissal. (C. A. D. C., No. 17,777.) After the dismissal of United's complaint, a group of affected employees brought a similar suit and were granted an injunction against the N. M. B. using a ballot which provided no space for a vote against representation, and the N. M. B., in turn, appealed this decision. (C. A. D. C., No. 18,068.) These appeals were consolidated and were argued in the Court of Appeals on February 13, 1964.

ARGUMENT.

I.

THE DECISION OF THE COURT OF APPEALS WAS NOT ERRONEOUS.

The Court of Appeals found that "although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute." (Appendix B to Petition, p. 7a.) This conclusion was eminently sound under the facts here. That being so, under the teaching of the 1943 trilogy relating to the scope of judicial intervention in disputes under the Railway Labor Act, the district court lacked jurisdiction to determine this dispute. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 (1943); *General Committee, etc.* v. *M.-K.-T. R. Co.*, 320 U. S. 323 (1943); *General Committee, etc.* v. *Southern Pacific Co.*, 320 U. S. 338 (1943).

The complaint here asked for an "injunction enjoining United from continuing its refusal to apply the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital to employees of Capital covered by that agreement who became employees of United upon consummation of the merger." (R. 12-13.)

But upon consummation of the merger a substantial part of these employees—530 of 2700—became part of another bargaining unit then in existence at United, represented by another labor organization and subject to a different collective bargaining agreement. The remaining former Capital employees became fully integrated with approximately 7,800 United employees, and subject to the same rates of pay and working conditions as were in effect

for the United employees—wages and working conditions which were generally more beneficial than those which had been in effect under the Brotherhood agreement at Capital.

Thus there are conflicting claims by two unions respecting jurisdiction over the work performed by many of these employees; there is a dispute as to the representative status of Brotherhood for a minority of a craft or class; there is a dispute as to the composition of the craft or class. Under the decisions of this Court, these issues may not be resolved in the judicial arena—and jurisdiction may not be created by the simple expedient of describing these issues as involving "validity of contract" as petitioner attempts.

The two *General Committee* cases, 320 U. S. 323 (1947) and 320 U. S. 338 (1943), involved contract disputes between the Brotherhood of Locomotive Engineers, representing engineeers, and the Brotherhood of Locomotive Firemen and Enginemen, representing firemen. The Firemen had negotiated agreements with the carriers concerning the promotion of firemen to engineer positions, which were inconsistent with the method worked out between the carriers and the Engineers. The Engineers brought actions for declarations that the collective bargaining agreements of the Firemen were invalid. Thus "validity of contract" was there involved.

In holding that there was no jurisdiction to resolve the controversy, this Court stated:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. * * * However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. * * * If the present dispute falls within § 2, Ninth, the administrative

remedy is exclusive. If a narrower view of §2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. • • •

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. • • • Courts should not rush in where Congress has not chosen to tread." *General Committee, etc. v. M.-K.-T. R. Co.*, 320 U. S. 323, 336-37.

A recent decision of the Court of Appeals for the Fourth Circuit, *Division No. 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (C. A. 4, 1962), *cert. denied* 369 U. S. 885 (1962), discussed the "validity of contract" theory in connection with a dispute arising out of the merger of the Virginian Railway and the Norfolk & Western Railroad. There the Interstate Commerce Commission, which has authority to approve railroad mergers, had left to the bargaining representatives the integration of seniority of the affected employees. The telegraphers of each railroad were represented by the Order of Railroad Telegraphers—Division 13 of the ORT representing the Virginian telegraphers, and Division 14, ORT representing the Norfolk & Western telegraphers. The two Divisions were unable to agree on an integration plan, and the national president of the ORT then entered into a collective bargaining agreement with the merged railroad, com-

promising the positions of each of the Divisions. Division 14 then brought suit to enjoin the railroad from acting under this agreement, relying on the union constitution and the provisions of the collective bargaining agreement between Division 14 and the Norfolk & Western relating to seniority rights of men on newly acquired lines. In holding that it lacked jurisdiction to reach the merits of the controversy, the Court stated:

> ". . . [I]n view of the General Committee cases, the conclusion is inescapable that district courts have no such authority where 'validity' of the contract depends upon the merits of a representation dispute." 298 F. 2d 17, at 20.

To avoid the obvious consequences of the conflicting IAM bargaining status for 530 former Capital employees, Brotherhood says in its petition that the IAM and United had the right after June 1, 1961 (the merger date) to negotiate for these employees. But its complaint filed more than five months later asked that United be required to accept the Brotherhood contract for the Capital employees covered by its terms who became United employees on June 1, 1961.

Brotherhood's dilemma is that if it forthrightly asks that its contract be applied to all former Capital employees —as it does in its complaint—then the jurisdictional dispute with the IAM is patent. But if it excludes these 530 former Capital employees now under the United-IAM contract, it is seeking a renegotiation of the Capital-Brotherhood agreement and a modification of the craft or class it purports to cover. This tack places Brotherhood in another untenable position—for then it is asserting its own prior representation rights to modify the Capital contract and cannot continue to claim that the action involves only "validity of contract" and not representation issues. Its position is further complicated by the

fact that it is then asking for not only a modified craft or class (its old Capital clerical craft less the ramp and stores employees represented by the IAM), but is asking for a minority craft or class—the 2,200 former Capital employees out of a total of 10,000 combined United and former Capital employees performing the same work side by side.

The 1934 amendments to the Railway Labor Act added the representation disputes settlement procedures of Section 2, Ninth, created the National Mediation Board, and clarified employee rights to organize and bargain collectively. 48 Stat. 1185. The draftsman of these amendments was Joseph B. Eastman, Federal Coordinator of Transportation, whose comments on the amendments have been accepted as authoritative by this Court. See *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 302-3 (1943).

In defining the "craft or class" concept as used in Section 2 of the Act—the unit of employees for which a majority was given the right to determine the representative for the craft or class—Commissioner Eastman testified:

> "Well, my understanding of the way in which the words 'craft' or 'class' have been defined in the past, is that they would cover the entire service of any particular carriers. That is, it would not be a class of employees, to pick out those that did work in a particular shop, but it would be all of the employees of the carrier, no matter in what shop they were located, who did that particular kind of work." Hearing on H. R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong. 2d Sess. (1934), p. 57.

In discussing the question of the maintenance of minority crafts or classes the Court of Appeals for the District of Columbia in *Switchmen's* stated:

"While this section [Section 1, Fifth of the Railway

> Labor Act] may give some stability to existing craft or class arrangements, it does not do so to the extent of allowing the maintenance of a particular representation arrangement which encompasses less than the whole of an established and recognized craft or class." *Switchmen's Union of North America* v. *National Mediation Board*, 135 F. 2d 785, 793 (C. A. D. C., 1943), *rev'd on jurisdictional grounds*, 320 U. S. 297 (1943).

Thus, a minority craft or class is not contemplated by the Railway Labor Act, and the obligation to bargain with such a craft cannot be imposed on United—except perhaps as a condition to merger approval by the C. A. B., in which event United would have had the alternative to proceed with the merger on that condition or to back off. See *Northwest Airlines, Inc.* v. *C. A. B.*, 303 F. 2d 395, 398 (C. A. 2, 1962).

Cases such as *City of Nashville, Tennessee* v. *United States*, 155 F. Supp. 98 (M. D. Tenn., 1957), *aff'd per curiam* 355 U. S. 63 (1957), cited at page 22 of the petition, are not relevant to the question of the jurisdiction of the district court here—since that case involved the imposition of a collective bargaining agreement by the Interstate Commerce Commission as a condition to approving the merger of two railroads. The C. A. B. would have had such power in approving the United-Capital merger, and the Court of Appeals for the District of Columbia would have had authority to review such a condition on petition to review the C. A. B. order. But the proceeding here was not one to review the merger. It was a proceeding which raised fundamental representation and jurisdictional questions, and "Congress * * * chose not to leave their solution to the courts." *General Committee, etc.* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 336 (1943).

II.

PETITIONER WAS NOT AND IS NOT WITHOUT A FORUM.

Even if it were a fact that petitioner is left without a forum in which to resolve its complaint this would not be adequate to confer jurisdiction since ". . . There may be * * * many areas in this field where neither the administrative nor the judicial function can be utilized." *General Committee, etc.* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 337.

But petitioner was not without a forum. It could have pursued its petition in the Court of Appeals for the District of Columbia to review the C. A. B. order which declined to impose the Capital agreement on United as a condition of approval of the merger. Its suggestion in its petition that it withdrew from that proceeding "when the Board [C. A. B.] made it clear it had simply declined to act on the Brotherhood request" (Pet. 7 fn. 3), does not justify petitioner's failure to have pursued that remedy. The C. A. B. opinion clearly recognized that the effect of its order would be that the Capital-Brotherhood contract would not be assumed by United on consummation of the merger and required the giving of notice to employees "who will be affected by a change or loss of representation and collective bargaining agreement." (R. 23.) In any event, it took the Brotherhood from May 19, 1961, when it filed its petition in the Court of Appeals to review the C. A. B. order, until November 6, 1961, to decide to withdraw from that proceeding. (C. A. D. C., Case No. 16,360; R. 23-24.)

Another forum available to petitioner is the National Mediation Board. Petitioner has invoked the procedures of this agency seeking representation rights for the entire group of employees at United in the craft or class it formerly represented at Capital. As indicated above, election

on this application has been delayed pending resolution of appeals arising out of separate suits brought by United and a group of its employees. These suits do not challenge the jurisdiction of the National Mediation Board over the representation dispute, but only its procedures in making craft or class determinations and its form of ballot, which does not allow an eligible employee the alternative of voting for no representation.

III.

THERE IS NO CONFLICT OF DECISIONS.

Petitioner claims the decision below is in conflict with the decision of the Second Circuit in *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52 (C. A. 2, 1963), *cert. granted* 373 U. S. 908 (1963), and of this Court in *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963).

Not only do these decisions present no conflict with the decision below, but they destroy one of petitioner's basic arguments—that United is bound by the Capital-Brotherhood contract because of Delaware corporation law. (R. 6, 12; Pet. 2, 12-13.)

In *Livingston* the Court of Appeals for the Second Circuit held that arbitration could be compelled under Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185, of issues relating to the existence of "property rights" or "vested rights" which were alleged to have arisen under a collective bargaining agreement in effect prior to a merger. Section 301 of the Labor Management Relations Act, however, expressly confers federal jurisdiction in "suits for violation of contracts between an employer and a labor organization." There is no comparable provision in the Railway Labor Act which governs labor relations in the railroad and airline industries. *Larsen* v.

American Airlines, Inc., 313 F. 2d 599, 603 (C. A. 2, 1963); *International Association of Machinists* v. *Eastern Airlines, Inc.*, 320 F. 2d 451, 455 (C. A. 5, 1963).

In addition, the merger involved in *Livingston* was not subject to federal regulation as was that between United and Capital, where the C. A. B. imposed full labor protective provisions in favor of the affected employees. The benefits provided by these provisions are themselves subject to arbitration, and the C. A. B. order approving the United-Capital merger reserved jurisdiction to "make such amendments, modifications, and additions to the protective labor conditions imposed . . . as circumstances may require." (Rec. 33; Labor Protective Provisions, Sec. 13, R. 40.)

In any event, aside from the fact that the *Livingston* case arose under the Labor Management Relations Act where there is an express grant of federal jurisdiction, the Court there specifically noted in support of its decision that "There is here no rival union, whose rights would be interfered with by the Union's pressing of these employee claims." 313 F. 2d 52, at 58.

International Association of Machinists v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), held that an award of a System Board of Adjustment for an air carrier was federally enforceable. *Central Airlines* raised no question of employee representation nor any issue of conflicting labor organization claims. The contract between the airline and the union was not in dispute. The only question was whether the action raised federal or state issues.

Both *Central Airlines* and *Livingston* make clear that in this area federal law is applicable and not state law. In the *Livingston* case, the court expressly held that the New York corporation law cited by the union to the effect that the consolidated corporation would be deemed to have

assumed all liabilities of the constituent corporations "is clearly not binding upon us." 313 F. 2d 52, at 56. The applicable federal law here has been set forth in the *General Committee* cases—there is to be no judicial intervention in representation and jurisdictional disputes arising under the Railway Labor Act.

One of the most recent reaffirmations of this doctrine is by the same court which decided *Livingston* v. *John Wiley & Sons, Inc.* One week before that decision the Court of Appeals for the Second Circuit decided *Flight Engineers' International Association* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (C. A. 2, 1963), *cert. denied* 373 U. S. 924 (1963). There the Flight Engineers sought to restrain the carrier from giving effect to a contract with the Air Line Pilots Association which related to terms and conditions of employment for flight engineer positions. The Court cited from the *General Committee* cases and concluded:

> "On the authority of these cases it is clear that the district court was without jurisdiction to grant the relief which the plaintiff sought. The doubtful claims of representation and the jurisdictional controversy are subjects upon which the [Railway Labor] Act provides for non-curial treatment. The courts must refrain from interfering in a field from which Congress has excluded them." 311 F. 2d 745, at 748.

See also *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248 (C. A. 2, 1963), *cert. denied* 32 U. S. L. Week 3287 (U. S. Feb. 18, 1964), where it was held that "the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth [of the Railway Labor Act] * * * *" 323 F. 2d 248, at 255.

CONCLUSION.

The result below is not only legally correct but realistic and equitable. The Brotherhood-Capital contract clearly contemplated that it would be applicable only to an entire craft or class of employees. The functional merger of United and Capital employees made impossible the application of different working conditions to each group. And it would have been inequitable for United to have applied to all its employees after the merger the terms in effect at Capital, which in almost every instance were inferior to those in effect at United.

The advantages to the affected employees in receiving the superior United benefits make clear that the underlying interest of petitioner here is not that of the employees whose "contract rights" it professes to be asserting, but rather its own interest as a bargaining representative seeking to preserve "maintenance of union membership and check-off of union dues." (pet. 6.)

The various administrative and judicial maneuvers of petitioner have been used by it in its campaign to organize the entire group of employees—United as well as former Capital. (R. 28, 41.) It dismissed its petition to review the C. A. B. merger order in the District of Columbia Court of Appeals after allowing that suit to remain on file for six months, and three days later started this action in the Ohio District Court. Two weeks after the decision of the district court dismissing its complaint, it instituted a representation proceeding with the National Mediation Board.

It is before this Board that its representational claims

should be ultimately settled, not in this Court. It is, therefore, respectfully requested that the petition be denied.

Respectfully submitted,

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No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

UNITED AIR LINES, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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v.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 131-138) is reported at 325 F.2d 576. The opinion of the United States District Court for the Southern District of Ohio, Western Division at Cincinnati (R. 127), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1963 (R. 131). The petition for a writ of certiorari was filed on January 31, 1964, and was granted April 20, 1964. The jurisdiction of this Court rests on Title 28, U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of the petitioner, the following questions are presented:

1. Did the United States District Court have jurisdiction of the subject matter of a complaint by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes against United Air Lines, Inc., which (a) alleged that United, upon the merger of Capital into United, had refused to assume the obligations of a collective bargaining agreement between Capital Airlines and the Brotherhood, including the provisions thereof for the arbitration of disputes as to its interpretation and application; (b) alleged that such refusal constituted a violation of such agreement, of the Railway Labor Act, of Delaware law, and of the merger contract between the two air carriers; and (c) asked the Court for a declaration of the rights of the parties and for injunctive relief against such violations?

2. Did the National Mediation Board have jurisdiction of the subject matter of such Brotherhood's complaint?

STATUTES INVOLVED

The statutory provisions involved are:

1. Sections 1331, 1337, 2201 and 2202 of Title 28 of the United States Code (28 U.S.C.A., Sections 1331, 1337, 2201 and 2202).

2. Section 2, First; Section 2, Seventh; Section 2, Ninth; Section 5, Second; Section 6; and Section 204 of the Railway Labor Act (45 U.S.C.A., Section 152, First; Section 152, Seventh; Section 152, Ninth; Section 755, Second; Section 156; and Section 184).

3. Section 328 of the Delaware General Corporation Law.

These statutory provisions are printed in Appendix A, *infra*, page 40, et seq.

STATEMENT

On May 13, 1947, the National Mediation Board, acting pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth), certified the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter called the "Brotherhood") as the designated representative for the purposes of the Railway Labor Act of all employees of Capital Airlines, a common carrier by air, in the craft or class of clerical, office, stores, fleet, and passenger service. Thereafter, the Brotherhood and Capital executed a collective bargaining agreement effective August 1, 1948, covering rates of pay, rules and working conditions of such craft or class of employees. (R. 4.) Such agreement was revised from time to time in accordance with the provisions of the Railway Labor Act. The last revision thereof became effective on August 3, 1959 (R. 13).

The agreement between the Brotherhood and Capital concerned matters typically covered by collective bargaining agreements such as seniority, protection of employees against arbitrary discipline and discharge, rules governing promotion, assignment, and displacement (R. 14-32, 111, 119). The agreement also con-

tained a union security provision requiring the employees to maintain membership in good standing in the Brotherhood and a provision for a check off of dues (R. 37-41).

In accordance with the requirements of Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184), the agreement contained a provision establishing a Board of Adjustment to arbitrate and determine disputes between the carrier and its employees or their representative concerning the interpretation or application of the agreement (R. 32-35).

Article 1(b) of the agreement dealt with the contingency of a future merger involving Capital and read as follows: (R. 24)

> "All provisions of this Agreement shall be binding upon the successors or assigns of the Company and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation, or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved."

On August 11, 1960, United and Capital entered into a merger agreement providing for the merging of Capital into United, with United as the surviving corporation (R. 5, 108). Section III, paragraph 1 of the merger agreement transferred to United all the rights, privileges, powers and franchises of Capital subject to all the restrictions, disabilities and duties of each of the constituent corporations as well as all of the property, real, personal and mixed of Capital. This section of the merger agreement also imposed upon

United the following obligations with respect to the duties, liabilities, and debts of Capital: (R. 5, 6)

> "United * * * shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations; * * * and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to United, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

Both United and Capital were Delaware corporations (R. 3, 4). At all times material, Section 328 of the Delaware General Corporation Law provided as follows: (App. A, page 44)

> "The liability of corporations * * * existing under the laws of this State * * * or the rights or remedies of the creditors thereof, or of persons doing or transacting business with the corporation, shall not in any way be lessened or impaired by the * * * merger of two or more corporations * * *."

In spite of the provisions of Article 1(b) of the collective bargaining agreement, quoted above, neither Capital nor United served any notice upon the Brotherhood of the proposed merger, and the organization first heard of the proposed merger in newspaper accounts thereof, published August 12, 1960 (R. 6, 108). The Brotherhood promptly, on August 16, 1960, wrote to both carriers calling their attention to the provisions of Article 1(b) of the collective bargaining agreement between Capital and the Brotherhood and asked for a meeting of the parties to arrange for implementation of the agreement upon consummation of the merger as provided in said Article. In these letters, the

Brotherhood also advised the two carriers of its position that United was required to assume the obligations of the agreement (R. 108, 109). Both Capital and United declined this request (R. 7, 108, 109).

United and Capital filed a joint application with the Civil Aeronautics Board for approval of the merger agreement under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1378). The Brotherhood appeared in the hearings before the Board and requested that, if the Board should approve the proposed merger, it impose as a condition of approval a requirement that United take over the Brotherhood-Capital agreement and apply such agreement to those employees of Capital covered by the agreement who became employees of United (R. 7). United opposed this request on the ground that the agreement automatically terminated upon consummation of the merger. (See Board findings below.)

On November 28, 1960, following the close of the hearings before the Board on the merger application, representatives of Capital finally met with representatives of the Brotherhood. At this meeting the Capital representatives stated that they could not negotiate any arrangements for the assumption by United of the obligations of the Brotherhood-Capital collective bargaining agreement which would be effective upon consummation of the merger or binding on United (R. 7).

On April 3, 1961, the Civil Aeronautics Board approved the merger of the two air carriers. *United-Capital Merger Case,* 33 C.A.B. 307. In its opinion approving the merger, the Board declined to require United to assume the obligations of the collective bargaining agreement between the Brotherhood and Capi-

tal. Its findings on this point read as follows: (pages 330, 331)[1]

> "IAM-BRC request that the Board condition approval of the merger upon acceptance and recognition by United of contracts which Capital now maintains with its employees. This has particular reference to the fact that the employment of clerks is covered by a collective bargaining agreement at Capital but not at United. United's position is that Capital will cease to exist upon the merger, whereupon the Capital employees will become employees of United and subject to the same bargaining agreements, rules, and practices (or lack of same) as United's other employees.
>
> "It would seem that this matter, on which the examiner did not comment, is one of the matters which should appropriately arise under section 11. That is to say, Capital and United should jointly

[1] The Brotherhood also asked the Board to condition any approval it granted for the merger by imposing the standard conditions which the Board had developed for the protection of employees adversely affected by airline mergers. *North Atlantic Route Transfer Case*, 12 C.A.B. 124 (1950); *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708 (1952); *Delta-C & S Merger Case*, 16 C.A.B. 647 (1952); *Flying Tiger-Slick Merger Case*, 18 C.A.B. 326 (1954); *Continental-Pioneer Acq. Case*, 20 C.A.B. 323 (1955); *Wien Alaska Air. Acq. of Byers*, 23 C.A.B. 428 (1956); *Colonial-Eastern Acq. Case*, 23 C.A.B. 500 (1956); *Mackey-Midet Acq. Case*, 24 C.A.B. 51 (1956). A reference to these Board decisions will show that the conditions thus imposed are basically a modification of the provisions of the Washington Agreement of May 1936, an agreement between railway labor organizations and major railroads to provide employees protection in the case of railroad coordinations. Such request and the conditions involved are unrelated to the dispute between the Brotherhood and United covering the continuity of the Brotherhood-Capital collective bargining agreement although they are set forth in the United affidavits filed in the District Court (R. 59-68). They relate primarily to benefits to be accorded Capital employees who lose their jobs as a result of the merger or are forced to take lower paying jobs.

> and severally give at least 45 days' notice to the employees who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement. This would then place the matter as a problem to be worked out between the companies and employees, in accordance with regular procedures applicable to the matter of representation and agreement."

On April 15, 1961, such notices were posted by United and Capital setting forth the intention of United not to assume the obligations of the Brotherhood-Capital collective bargaining agreement, but to subject the employees of Capital covered by such agreement to unilateral rules imposed by company regulations upon the consummation of the merger (R. 49, 54-56).

The Brotherhood sought to carry out the Board's finding that it was leaving the matter as a problem to be "worked out between the companies and employees" by meeting with officers of United on May 9, 1961. At that meeting, United advised the Brotherhood that it would not assume any of the obligations of the collective bargaining agreement between Capital and the Brotherhood. Since that date, United has refused to meet with representatives of the Brotherhood to discuss the matter (R. 110).

The Brotherhood interpreted the Board's order as having passed judgment upon the obligations of United to take over and apply the collective bargaining agreement between Capital and the Brotherhood. It therefore filed a petition with the United States Court of Appeals for the District of Columbia Circuit to review and set aside the Board's order approving the merger insofar as it related to employee matters. This petition was identified as *Brotherhood of Railway and*

Steamship Clerks v. *Civil Aeronautics Board* (Case No. 16,360). (R. 49). The Brotherhood also sought a partial stay of the proposed merger, insofar as it might permit United to violate the rights of employees covered by the Brotherhood-Capital agreement (R. 49). In its answer to the Brotherhood's motion for a stay, the Board disclosed that in approving the merger without imposing the condition requested by the Brotherhood relating to United's duty to assume the obligations of the collective bargaining agreement, the Board had not passed upon nor had it intended to pass upon the question of whether such agreement was a lawful obligation of United upon the consummation of the merger. This statement of the Board read as follows: (R. 50)

> "The Board did not accede to the Brotherhood's contention that the Capital acquisition should be 'conditioned' upon the assumption by United of the collective bargaining agreement. Neither did it purport to pass on the issue of whether United would be justified, as a matter of contract or labor law, in ignoring the agreement. In these circumstances, and since Government counsel do not know the effect which issuance of the stay here sought might have upon United's operation of the merged system, we leave the argument to the private parties."

Under the circumstances, the Court denied the stay and the Brotherhood subsequently withdrew the petition (R. 50).[2]

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[2] The Court affirmed the Board's order approving the merger on petitions to review filed by Delta, Eastern, and Northwest. *Northwest Airlines, et al.* v. *Civil Aeronautics Board*, 303 F. 2d 395 (D.C. Cir., 1962).

The merger was consummated on June 1, 1961 (R. 8). Immediately prior thereto, Capital had approximately 6,500 non-management employees of whom approximately 2,700 were covered by the Brotherhood-Capital agreement (R. 48, 50). It operated extensive routes in interstate commerce in the eastern part of the United States. (See map attached to *United-Capital Merger Case,* 33 C.A.B. 307.) United was a much larger airline. Immediately prior to the merger, it had approximately 21,000 non-management employees. Of these, approximately 10,000 belonged to the same craft or class of employees as the Capital employees covered by the Brotherhood-Capital agreement (R. 47, 51). Approximately 7,800 of these had no representation and their rates of pay, rules, and working conditions were covered by company regulations. The remaining 2,200 were in a group designated as ramp and stores employees and were covered by an agreement between United and the International Association of Machinists (hereinafter called the "IAM").[3]

The 2,700 employees of Capital covered by the Brotherhood-Capital agreement became employees of United, which continued the Capital routes and services (R. 8, 51, 52). Of these, United applied its company personnel regulations to some 2,170 employees and refused to accord them the benefits of the Brotherhood-Capital agreement governing their employment (R. 52, 110-112). Affidavits filed by United in the District Court stated that the remaining 530 were ramp and stores employees and that by a letter agreement of June 23, 1961, between United and the IAM, these employees were integrated into that group (R. 51, 93-98).

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[3] R. 51, 69-90.

Section 5, Second of the Railway Labor Act (45 U.S.C.A., Section 155, Second) provides that in any case in which a controversy arises over the meaning or application of an agreement reached through mediation, either party may apply to the National Mediation Board for an interpretation of the meaning or application thereof. The Brotherhood-Capital agreement was such an agreement (R. 5). Therefore, on May 29, 1961, the Brotherhood filed an application with the National Mediation Board pursuant to Section 5, Second of the Railway Labor Act for an interpretation of the meaning or application of the Brotherhood-Capital agreement (R. 7, 8, 41). After a hearing at which United appeared and opposed the Brotherhood's application (R. 8), the National Mediation Board, on August 25, 1961, granted the application and issued an opinion interpreting Article 1(b) of the agreement (R. 41-45). This opinion held that the provisions of Article 1(b) were unambiguous and clearly meant precisely what it said. The Mediation Board's conclusion on the point read as follows: (R. 44)

> "After reviewing the record of mediation in NMB Case No. A-6037, as well as the transcript of hearings and briefs submitted by the Brotherhood and United Air Lines, Inc., this Board is of the opinion that the language of Article 1(b) of the agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambiguous. In other words, the language means just what it says and we so find."

At the same time, the Mediation Board found that it did not have jurisdiction to spell out the rights and obligations of the parties after the merger of Capital

and United. The conclusions of the Mediation Board upon this point read as follows: (R. 44)

> "It must be pointed out, however, that the mediation agreement was executed on August 3, 1959, while the merger agreement between Capital and United was executed on August 11, 1960. Section 5, Second of the Railway Labor Act, in our view, delegates no authority to this Board to interpret or construe the merger agreement, which is a document foreign to its processes. *The legal authorities cited by the Brotherhood may sustain its position, but this Board lacks jurisdiction to do anything more by interpretation than to construe the instrument produced through its mediatory function.* It is true that the language relied upon looks to the future, but can it be said that the quoted provision clothes this Board with authority to pass upon issues which arise out of subsequent developments such as mergers or consolidations? We think not. In sum, we find that the language is clear and unambiguous, but fail to find authority to spell out the rights and obligations of the parties in the situation presented here." (Emphasis supplied.)

Following the issuance of the Mediation Board's opinion, the Brotherhood made another effort to settle the dispute by negotiation with United upon the basis of the Mediation Board's decision. United refused to meet with the Brotherhood to discuss the matter (R. 8).

Finally, the Brotherhood sought to obtain a determination of the rights of the employees involved through the processing of grievances pursuant to the provisions of Article 43 of the agreement, which provides for a Board of Adjustment to render final and binding determinations on the application and interpretation of the agreement (R. 10, '32). However,

United refused to accept and process these grievances, thus frustrating the Board of Adjustment arbitration process (R. 10).

The Brotherhood, therefore, on November 9, 1961, filed its complaint in the United States District Court for the Southern District of Ohio, Western Division at Cincinnati, for declaratory and injunctive relief (R. 3-11). The headquarters of the Brotherhood are in such judicial district (R. 3) and United engages in air transportation within the District (R. 3, 4).

This complaint alleged the existence of the Brotherhood-Capital agreement and its pertinent provisions; the history of the dispute between the Brotherhood and United with regard to the status of the agreement as a result of the United-Capital merger; United's refusal to assume any of the obligations of the agreement; and further alleged that United's actions violated (a) the terms of the agreement, (b) the provisions of Section 2, First; Section 2, Seventh; Section 6 and Section 204 of the Railway Labor Act, (c) the provisions of applicable Delaware statutes, and (d) the terms of the merger contract between the two air carriers.

The complaint asked for the following declaratory and injunctive relief: (R. 11)

> "(1) That the Court declare the legal rights of the parties with respect to the actual controversy hereinabove described, and their legal relations with respect to the agreement of August 3, 1959;
>
> "(2) That the Court declare that United is a successor or assign of Capital within the meaning of the provisions of Article 1, paragraph (b) of the collective bargaining agreement of August 3,

1959, between the Brotherhood and Capital making the provisions of said agreement binding upon the successors or assigns of Capital;

"(3) That the Court declare that United assumed the liabilities and duties of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital by reason of the provisions of Section III, paragraph 1 of the merger agreement of August 11, 1960, between Capital and United;

"(4) That the Court declare that by operation of the laws of the State of Delaware, United is bound by the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital;

"(5) That the Court issue an injunction enjoining United from continuing its refusal to apply the provisions of the collective bargaining agreement of August 3, 1959, between the Brotherhood and Capital to employees of Capital covered by that agreement who became employees of United upon the consummation of the merger;

"(6) That the Court assess the costs of this action against the defendant and grant to the plaintiff all other legal and equitable relief to which it may be entitled."

On December 26, 1961, United filed a motion with the District Court asking for dismissal of the complaint or for summary judgment on the following grounds: (R. 45, 46)

"1. The Court is without jurisdiction of this cause since it relates to a dispute as to who are the representatives under the Railway Labor Act certain of the employees of United Air Lines, Inc. Exclusive jurisdiction to determine such a dispute vests with the National Mediation Board under the provisions of Section 2, Ninth, of the

Railway Labor Act (45 U.S.C. Section 152, Ninth).

"2. If the relief requested by plaintiff were granted, United would be required to treat with a bargaining representative for a minority of a craft or class of employees, contrary to the provisions of the Railway Labor Act under which a carrier may be compelled to deal only with the representative designated by a majority of the craft or class.

"3. It is apparent from the fact of the Agreement between plaintiff and Capital Airlines, Inc. (Exhibit A to the Complaint), which Agreement plaintiff asks the Court to declare is binding upon United, that the Agreement was not intended to be and can not be—either legally or practically—applied to less than the entire craft or class of employees covered under its provisions.

"4. The International Association of Machinists now represents approximately 530 employees for whom the plaintiff here seeks representation rights. The relief requested herein cannot be granted without adversely affecting the rights of that labor organization under the Railway Labor Act and under its agreement with United. Hence, if the Court concludes it had jurisdiction of this cause, then the International Association of Machinists is an indispensable party to this action, but has not been named as a party by the plaintiff."

The Brotherhood filed a cross-motion for summary judgment (R. 105, 106).

The IAM, through its General Counsel, advised the Brotherhood that there was no dispute between the two organizations with respect to the representation of employees on the property of United and that accordingly the IAM had no interest in the litigation

between the Brotherhood and United (R. 122). This advice was submitted to the District Court by way of affidavit in support of the Brotherhood motion (R. 114, 116, 122, 123).

On August 9, 1962, the District Court granted United's motion to dismiss the complaint upon the ground that the Court was without jurisdiction of the cause since it relates to a dispute as to who are the representatives under the Railway Labor Act of certain employees of United and that the Mediation Board has exclusive jurisdiction over such disputes under Section 2, Ninth of the Railway Labor Act (R. 127-129).

The cross-motions of the Brotherhood and United for summary judgment were also denied for lack of jurisdiction (R. 129).

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court upon the same grounds (R. 131-138).

While the appeal from the District Court's decision was pending before the Sixth Circuit, the Brotherhood, on August 24, 1962, filed an application with the National Mediation Board for certification under Section 2, Ninth of the Railway Labor Act as representative of the entire craft or class of employees of United, of which the employees of Capital covered by the collective bargaining agreement between the Brotherhood and Capital were a part. (See page 10, *supra*.) This application has not been processed because United and a group of its employees calling themselves the Association for the Benefit of Non-Contract Employees brought separate suits in the United States District Court for the District of Columbia to enjoin the Media-

tion Board from holding a representation election on the application unless (a) the Board first conducted a hearing for the purpose of re-examining the composition of the craft or class of United employees among whom such election should be held, and (b) the ballot used in the election contained a place for employees, to affirmatively vote "no union". These requests had been submitted to and denied by the Board. The Brotherhood intervened in the suit brought by the employee group as a party defendant.

The District Court dismissed United's complaint. A different judge of the District Court granted the injunction requested by the employee group. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed these judgments. *United Air Lines, Inc.* v. *National Mediation Board, et al.; National Mediation Board, et al.* v. *Association for the Benefit of Non-Contract Employees;* and *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 330 F.2d 853 (1964). On June 1, 1964, both the Brotherhood and United filed petitions with this Court for writs of certiorari to review such judgments. (Cases Nos. 1170 and 1171—October Term, 1963.)

SUMMARY OF ARGUMENT

I

Implicit in the position of United throughout that carrier's dispute with the Brotherhood concerning the carrier's obligations with respect to the Brotherhood-Capital collective bargaining agreement has been the contention that such agreement terminated upon consummation of the merger of Capital into United. This Court's decision in *John Wiley & Sons, Inc.* v. *Living-*

ston, 376 U.S. 543 (1964), disposes of this argument contrary to the position of United. In both cases the surviving corporation continued the operations of the merged corporation and utilized the employees covered by the collective bargaining agreement. The Brotherhood-Capital agreement, like the agreement in *Wiley & Sons,* contains a provision to arbitrate. In addition, the Brotherhood-Capital agreement, unlike the agreement in *Wiley & Sons,* contains a provision that the agreement shall be binding on successors or assigns of Capital. There is thus an even stronger case for the continuing vitality of the Brotherhood-Capital agreement.

The Brotherhood-Capital agreement was executed pursuant to the Railway Labor Act, whereas the *Wiley & Sons* agreement was subject to the National Labor Relations Act. However, this difference does not affect the continuation of the agreement following the merger. The same considerations of national labor policy which supported the decision in *Wiley & Sons* are applicable to agreements subject to the Railway Labor Act. Moreover, Section 2, First of that statute places a duty upon both carriers and employees to maintain collective bargaining agreements. The continuation of the obligations of the Brotherhood-Capital agreement upon consummation of the United-Capital merger is also consistent with practice in both the railroad and air transport industries under the Railway Labor Act.

II

The District Court had jurisdiction of the subject matter of the Brotherhood complaint seeking a declaratory judgment with respect to the status of the Brotherhood-Capital agreement after consummation of the United-Capital merger and injunctive relief

against United's continued refusal to recognize its obligations under that agreement. The complaint alleged that United's action violated Sections 2, First, 2, Seventh, 6, and 204 of the Railway Labor Act, as well as the requirements of Delaware law under which the merger contract was executed, the provisions of the merger contract, and the provisions of the Brotherhood-Capital agreement. There was thus clearly presented issues over which the District Court had jurisdiction under Title 28 of the United States Code, Sections 1331 and 1337.

The fact that the Brotherhood complaint raised Federal issues was not contested by United nor was the complaint dismissed by the District Court on that ground. Rather, both the District Court and the Court of Appeals concluded that the complaint gave rise to a representation dispute subject to the exclusive jurisdiction of the National Mediation Board pursuant to Section 2, Ninth of the Railway Labor Act. Neither of the Courts below made clear the nature of this dispute or the parties thereto. However, United contended to both Courts that the Brotherhood complaint gave rise to a representation dispute between the Brotherhood and the IAM with respect to a group of approximately 530 ramp and stores employees out of 2700 employees covered by the Brotherhood-Capital agreement because the ramp and stores employees were represented on United by the IAM and such employees had been integrated into the IAM representation subsequent to the merger.

It is submitted that the situation to which United adverts does not convert the Brotherhood complaint into a suit to adjudicate a representation dispute nor serve to defeat enforcement of the Brotherhood-Capital agreement against United. There is admittedly

no representation dispute as to the approximately 2,170 employees covered by the Brotherhood-Capital agreement who have been unrepresented on United. Their rights under the agreement cannot be defeated by reason of the status of the much smaller group of ramp and stores employees. Moreover, a decision pursuant to the Brotherhood complaint to the effect that United was required to assume the obligations of the Brotherhood-Capital agreement upon consummation of the merger on June 1, 1961, would not create any dispute between the Brotherhood and the IAM with respect to representation of the other 530 ramp and stores employees. Such a decision would only establish that on the date of the consummation of the merger United was required to assume the obligations of the Brotherhood-Capital agreement until terminated in accordance with the provisions of the Railway Labor Act. United asserts that it made a new agreement covering the 530 ramp and stores employees with the IAM on June 23, 1961. The Brotherhood complaint does not seek to adjudicate the validity of that agreement. The IAM has recognized that the Brotherhood complaint does not give rise to any representation dispute between the two organizations and has stated that it has no interest in the litigation.

United has also contended that the Brotherhood-Capital agreement cannot be enforced because the Brotherhood cannot represent a minority of the craft or class on the property of the carrier. This contention is determined contrary to the United position by the decision in *Wiley & Sons.*

The Court of Appeals in its decision also referred to the impracticality of enforcing the Brotherhood-Capital agreement as to a minority of the craft or class

on United. This reason for denying the continued vitality of the agreement was also rejected by this Court in *Wiley & Sons*. Moreover, the agreement itself provides for conferences between the Brotherhood and the successor company to Capital to provide for its implementation of the agreement on the property of such successor. This procedure has proved practicable in the integration of employees following railroad mergers.

Reference to Section 2, Ninth of the Railway Labor Act shows that it concerns itself solely with disputes between employees of a carrier as to who is their representative. The controversy between the Brotherhood and United is not such a dispute. This conclusion has been confirmed by the decision of the National Mediation Board when the Brotherhood applied for an interpretation of the meaning and application of the Brotherhood-Capital agreement. The Board held that it had no jurisdiction to determine the status of the agreement following the United-Capital merger. Thus, the decision below holds that the Mediation Board has jurisdiction over the subject matter of a dispute which that Board has already declined to determine.

ARGUMENT

I

THE MERGER OF CAPITAL INTO UNITED DID NOT TERMINATE THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BROTHERHOOD AND CAPITAL.

Implicit in the position of United from the beginning of its dispute with the Brotherhood under the collective bargaining agreement between the Brotherhood and Capital has been the contention that the obligations of such agreement terminated upon the consummation of the merger of Capital into United.

This contention stands rejected by this Court's decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 11 L.ed.2d 898 (1964). In that case, as here, one surviving corporation in a merger of two corporate enterprises refused to accept and recognize the obligations of a collective bargaining agreement between a union and the merged corporation. The surviving corporation asserted that the merger terminated the collective bargaining agreement for all purposes. This Court rejected that contention in the following finding: (11 L.ed.2d at 904)

> "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement * * *."

This Court then went on to state the principles governing this holding as follows: (11 L.ed.2d at 904, 905)

> "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. '... [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate .... The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant'."[4]

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[4] In footnote 3 (page 904) this Court pointed out by way of comparison the general rule that in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears. This is also the requirement of Delaware General Corporation Law which governed the merger of United and Capital (R. 6). The merger agreement of the two carriers also provided that United should assume the debts and liabilities of Capital (R. 5).

This Court also pointed out that such a rule was necessary to the protection of the interest of employees and the objectives of the national labor policy. It's conclusions on this point read as follows: (11 L. ed. 2d 904)

> "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.".

On June 10, 1964, the United States Court of Appeals for the Ninth Circuit, citing the *Wiley & Sons* decision as controlling authority, held that a corporation which had purchased and continued to operate the business of another corporation was required to honor a collective bargaining agreement entered into by the predecessor corporation: *Wackenhut Corporation* v. *International Union, United Plant Guards of America*, 56 LRRM 2466.[5] In its original decision in this case, dated February 19, 1964 (55 LRRM 2554), the Ninth Circuit had held that the successor corporation was not bound by the collective bargaining agreement under the circumstances which did not involve a merger of

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[5] The decision is not yet officially reported. The reference is to pages of the Labor Relations Reference Manual.

the two corporations. It's holding on this point read as follows: (55 LRRM at 2558)

> "The general rule is that where one company sells or otherwise transfers all of its assets to another company, the purchaser is not, absent its express consent, liable for the debts and liabilities of the seller. The rule is otherwise, however, where: (1) the transaction amounts to a consolidation or merger; (2) the purchasing company is merely a continuation of the selling company; or (3) the transaction is entered into fraudulently in order to escape liability for such obligations. 15 Fletcher, Private Corporations, (perm. ed. 1961 rev. vol.) § 7122, p. 187.
>
> "Applying this rule in the field of labor relations, it has heretofore been held, in effect, that where none of the indicated exceptions are applicable, that a purchasing corporation is not bound by a collective bargaining agreement entered into by the selling corporation."

It should be observed that the Ninth Circuit held, even before the *Wiley & Sons* decision, that where the transaction constitutes a merger as in the case of United and Capital that the successor corporation is bound by the agreement with the non-surviving corporation.

On rehearing, the Ninth Circuit spoke as follows with respect to the effect of the *Wiley & Sons* decision on the case: (56 LRRM 2469)

> "In our opinion the judgment for the unions is not sustainable on the ground, relied upon by the trial court, that subsequent to the sale by General Plant to Wackenhut, the latter agreed to fulfill the obligations of the General Plant collective bargaining agreement. No purpose will be served by stating our reasons for reaching this conclusion

because we hold that the judgment is in any event sustainable on another ground urged at the trial and renewed here. That ground is that under the circumstances of this case, and apart from the exchange of telegrams and the telephone conversations referred to above, the policy of the national labor laws obligates Wackenhut, as the successor employer, to honor the collective bargaining agreement entered into by its predecessor, General Plant.

"This conclusion, we believe, is required by the recent decision of the Supreme Court in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 55 LRRM 2769, rendered after the appeal was taken in the case before us. In that case it appeared that Interscience Publishers, Inc., after entering into a collective bargaining agreement, which included an arbitration provision, merged with John Wiley & Sons, Inc., and ceased to do business as a separate entity. There was then a wholesale transfer of employees from Interscience to Wiley which engaged in the same business. The Supreme Court held that Wiley, as the successor employer, is bound by the preexisting labor agreement and is obligated to arbitrate grievances presented by the union which is a party to that agreement.

"There are statements in the opinion of the Supreme Court in Wiley which, considered separately, might appear to indicate that the fact that the change of employers had been accomplished by a merger, rather than by a sale and purchase of assets as in our case, was a controlling factor in reaching the result indicated. Reading the opinion as a whole, however, we are convinced that the Supreme Court did not rest the decision in Wiley on that narrow ground, but upon a broader view dictated by the policy of the national labor laws.

"What the Supreme Court did in Wiley was to balance the rightful prerogative of owners inde-

pendently to rearrange their businesses and even eliminate themselves as employers against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship. Having in view the objectives of national labor policy reflected in established principles of federal law, the court held the described interest of the employees outweighs that of the employer, and must prevail.

"The specific rule which we derive from Wiley is that where there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership, a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer is binding upon the successor employer."

The basic circumstances of the present case are almost identical to those involved in the *Wiley & Sons* case. There was in each case a collective bargaining agreement between a union and a company which subsequently merged itself into another company; the business and operations of the non-surviving corporation were continued by the surviving corporation; the surviving corporation was the larger of the two companies; the employees involved became employees of the surviving corporation; and finally, the collective bargaining agreement contained provisions for the arbitration of disputes concerning its interpretation and application.

There are three differences in the circumstances surrounding the *Wiley & Sons* case and the circumstances surrounding the present case. These are:

First: The agreement in *Wiley & Son* did not contain a provision that the agreement should be binding upon a successor corporation. The Brotherhood-Capital agreement did contain such a provision, including a provision for the parties to meet and agree upon the procedures for implementing the application of the agreement upon consummation of the merger (R. 24). The Brotherhood promptly insisted to both carriers that this obligation be met (R. 7, 108, 109). The existence of this provision strengthens the Brotherhood case for a continuance of the agreement upon the merger, in contrast to the agreement in the *Wiley & Sons* case which did not contain a successor provision.

Second: The Brotherhood-Capital agreement was executed pursuant to the provisions of the Railway Labor Act, whereas the *Wiley & Sons* agreement was subject to the provisions of the National Labor Relations Act. This difference does not affect the continuity of the agreement because the statement of national labor policy by this Court as a basis of its decision in the *Wiley & Sons* case is equally applicable to agreements executed under the Railway Labor Act. Indeed, Section 2, First of the Railway Labor Act (45 U.S.C.A. Section 152, First) imposes a duty upon carriers and employees to make and maintain collective bargaining agreements. Moreover, the continuing vitality of collective bargaining agreements in cases of mergers has been consistently recognized in the railroad and airline industries subject to the Railway Labor Act. *Norfolk & Western Railway Company-Virginian Railway Company—Merger*, 307 I.C.C. 401; *City of Nashville, Tennessee* v. *United States*, 155 F. Supp. 98, 105 (U.S. D.C.-M. D. Tenn., Nashville Div., 1957), aff'd Per Curiam 355 U.S. 63; *Colonial-Eastern Merger*, 23 C.A.B. 500 (R. 115-118); *Alaska Coastal Airlines, Inc.-Ellis Airlines Merger Case* (R. 119-121).

Third: In the *Wiley & Sons* case no union represented any of the employees on the property of the surviving corporation. In the present case, the affidavits of United show that 530 of the approximately 2,700 employees covered by the Brotherhood-Capital agreement belonged to a group of ramp and stores employees represented on the property of United by the IAM (R. 51, 69-90) and, as also shown by such affidavits, were brought under such agreement after the consummation of the merger (R. 51, 91-98). For the reasons set forth below at pages 30-39, it is the Brotherhood position that this difference is of no significance in the enforcement of the obligations of the Brotherhood-Capital agreement against United.

II

THE DISTRICT COURT HAD JURISDICTION OVER THE COMPLAINT OF THE BROTHERHOOD TO REQUIRE UNITED TO ASSUME THE OBLIGATIONS OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BROTHERHOOD AND CAPITAL

The complaint of the Brotherhood in the present case asked for a judicial declaration as to the rights of the parties and their legal relations with respect to the Brotherhood-Capital agreement and for necessary injunctive relief (R. 11). It is submitted that the District Court had jurisdiction to grant this relief.

A. A suit to enforce a collective bargaining agreement executed pursuant to the Railway Labor Act is governed by Federal law.

Paragraph 2 of the Brotherhood complaint in the District Court set forth the jurisdiction of the court over the subject matter as follows: (R. 3)

> "The jurisdiction of this Court derives from the Act of June 25, 1948 (28 U.S.C.A. Sections 1331 and 1337), and from said Act as amended by the Acts of July 26, 1956, and July 25, 1958 (28 U.S.C.A. Section 1332). The matter in con-

troversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and involves the Railway Labor Act (45 U.S.C.A. Sections 151 et seq.). As hereinafter more fully described, full diversity of citizenship exists between plaintiff and defendant."

Paragraphs 22 through 25 of the complaint (R. 9, 10) alleged that United's refusal to assume the obligations of the Brotherhood-Capital collective bargaining agreement constituted a violation of the provisions of Section 2, First; Section 2, Seventh; Section 6 and Section 204 of the Railway Labor Act. These allegations clearly brought the complaint within the requirements of Title 28, Section 1331 of the United States Code, which confers jurisdiction in the District Court over all civil actions arising under the Constitution and the laws and treaties of the United States where the matter in controversy exceeds a stated amount.[6] These allegations were also sufficient to bring the complaint within the requirements of Title 28, Section 1337 of the United States Code, which confers jurisdiction in the District Court with respect to any civil action arising under any act of Congress regulating commerce. In addition, the decision in *Wiley & Sons* as well as this Court's decision in *International Association of Machinists* v. *Central Air Lines*, 372 U.S. 682 (1963), attest to the fact that the collective bargaining agreement here involved is governed by Federal law and that a suit to enforce such agreement may properly be brought in a Federal court.

The *Central Air Lines* case involved a decision to enforce an arbitration award rendered by an Adjustment Board created by agreement pursuant to Section

[6] The jurisdictional amount of $10,000 exclusive of interest and costs is alleged in Paragraph 2 of the complaint, quoted above.

204 of the Railway Labor Act (45 U.S.C.A., Section 184). This Court stated as follows with reference to the application of Federal law to collective bargaining agreements: (page 693)

> "'* * * A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it * * *' Railway Employes' Dept. A.F. of L. v. Hanson, 351 US 225, 232, 100 L ed 1112, 1130, 1131, 76 S Ct 714. That is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts."

Again, in *Wiley & Sons*, this Court stated as follows with respect to the controlling nature of Federal law in a suit to enforce a collective bargaining agreement: (page 904)

> "Federal law, fashioned 'from the policy of our national labor laws,' controls. Textile Workers Union v. Lincoln Mills, 353 US 448, 456, 1 L ed 2d 972, 980, 77 S Ct 912. State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case, id., 353 US at 457, 1 L ed 2d at 981, but the law which ultimately results is federal."

It is, therefore, clear that the District Court had jurisdiction of a complaint of the type here involved.

B. The Brotherhood complaint did not give rise to a representation dispute over which the National Mediation Board has exclusive jurisdiction under Section 2, Ninth of the Railway Labor Act.

In spite of the fact that the Brotherhood-Capital agreement was clearly governed by Federal law, the District Court held that it was without jurisdiction of the subject matter of the Brotherhood complaint since it related to a dispute as to who are the representatives

under the Railway Labor Act of certain of the employees of United, and exclusive jurisdiction of such a dispute is conferred upon the National Mediation Board by Section 2, Ninth of the Railway Labor Act. (R. 127.) The decision of the Court of Appeals affirmed this conclusion (R. 131-138).

There has been no disagreement between the Brotherhood and United over the proposition that a dispute among the air carrier's employees as to who are the representatives of such employees is vested within the exclusive jurisdiction of the National Mediation Board by the provisions of Section 2, Ninth of the Railway Labor Act. However, the Brotherhood submits that the complaint in this case does not seek the adjudication of such a dispute.

Section 2, Ninth of the Railway Labor Act reads as follows:

> "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate

> method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The complaint of the Brotherhood in the District Court (R. 3-11) clearly does not by its terms seek adjudication of any dispute between the Brotherhood and any other organization with respect to the representation of any employees of United. The decision of the Court of Appeals recognizes this to be true but finds that "looking through form to substance" it, in fact, does involve a representation dispute (R. 136).

Neither the decision of the District Court nor that of the Court of Appeals makes clear the precise nature of the representation dispute which these Courts found the complaint in substance sought to adjudicate. However, in its brief in opposition to the petition for certiorari in this Court, United contends that there are three disputes involved which are representation disputes over which the National Mediation Board has exclusive jurisdiction. These are (1) conflicting claims by two unions respecting jurisdiction over many of the employees covered by the Brotherhood-Capital

agreement; (2) a dispute as to the representative status of the Brotherhood for a minority of the craft or class; and (3) a dispute as to the composition of the craft or class. However, an examination of these arguments show that they are wholly without merit.

First: It is argued that if United is bound to assume the obligations of the Brotherhood-Capital agreement a representation dispute will arise as to proper representation of 530 of the former Capital employees covered by that agreement belonging to the group of ramp and stores employees who are represented on United by the IAM. Even if this argument has validity as to the 530 ramp and stores employees, it has no validity as to the remaining 2,170 employees of United covered by the Brotherhood-Capital collective bargaining agreement who are admittedly not represented on the property of United (R. 51, 110-112). These employees are in the identical position as the employees who were merged into the surviving corporation in the *Wiley & Sons* case. A declaratory judgment on the rights of parties under the agreement could easily give recognition to the differing status of the 2,170 employees covered by the Brotherhood-Capital agreement as against the 530. It would clearly be a violation of their rights to deprive the 2,170 employees of the benefits of the Brotherhood-Capital agreement because of a claimed dispute as to representation rights with respect to another much smaller group of employees covered by that agreement. If the argument of United were carried to its logical conclusion, it would prevent the 2,170 employees from receiving their contract rights if only 1 employee belonged to another group represented by another union.

Moreover, the alleged dispute between the Brotherhood and IAM over representation of the 530 em-

ployees is a controversy which United has created in order to defeat the rights of all the employees involved. A decision by the District Court requiring United to assume the obligations of the Brotherhood-Capital collective bargaining agreement would not decide any representation rights between the Brotherhood and the IAM as to the 530 ramp and stores employees. The rights of these 530 employees under the Brotherhood-Capital agreement do not depend upon the identity of their representative. If United was required by law to assume the obligations of this agreement, then that agreement became effective as to those employees on June 1, 1961, the date of the consummation of the merger, regardless of the identity of their representative, until terminated or revised in accordance with the Railway Labor Act. United's affidavits filed with the District Court stated that such termination as to the 530 ramp and stores employees took place on June 23, 1961 (R. 51, 91-98). If the factual allegations of United are correct, a decision to the effect that United was required to assume the obligations of the Brotherhood-Capital agreement upon consummation of the merger on June 1, 1961, would simply mean that between June 1 and June 23, 1961, the 530 ramp and stores employees were entitled to the benefits of that agreement regardless of who was their representative. The Brotherhood complaint does not ask the District Court to determine the validity of the agreement between United and the IAM or to decide that the Brotherhood has any representation rights as to the 530 employees involved.

The IAM recognized that the Brotherhood complaint did not give rise to any representation dispute between that organization and the Brotherhood concerning any of United's employees. Its General Counsel examined

the complaint and advised the Brotherhood that no such dispute existed and that the IAM had no interest in the litigation (R. 122).

Second: It is suggested that the Brotherhood complaint gives rise to representation questions under the exclusive jurisdiction of the National Mediation Board because in effect it seeks representation rights for a minority of a craft or class. The decision of this Court in the *Wiley & Sons* case eliminates this contention from the picture. This Court spoke as follows on the question of continued representative status of a certified union following a change of ownership: (page 905)

> "In addition, we do not suggest any view on the questions surrounding a certified union's claim to continue representative status following a change in ownership. See, e.g., Labor Board v Aluminum Tubular Corp. 299 F2d 595, 598-600; Labor Board v McFarland, 306 F2d 219; Cruse Motors, Inc. 105 NLRB 242, 247. This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement."

The Brotherhood is in the same position. It does not assert that it has any bargaining rights independent of the Brotherhood-Capital agreement. It seeks to establish rights under that agreement, not to negotiate a new agreement.

Moreover, this Court went on to specifically find that the fact that the union in the *Wiley & Sons* case did not represent a majority of the bargaining unit of the surviving corporation did not prevent it from representing the employees covered by the agreement in

dispute. This Court's findings on this point read as follows: (page 905, footnote 5)

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633, v Lion Dry Goods, Inc., 369 US 17, 7 L ed 2d 503, 82 S Ct 541. There is no problem of conflict with another union, cf. L. B. Spear & Co., 106 NLRB 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees."

The Court of Appeals in its decision here under review referred to the "impracticable result" which would follow from applying the collective bargaining agreement between the Brotherhood and Capital to a minority craft or class of United's employees" (R. 136). In the *Wiley & Sons* case, this Court considered such a problem and rejected it as a basis for refusing to enforce the collective bargaining agreement involved following a merger. This Court's finding on this point read as follows: (page 906, footnote 5 continued)

> "Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached

which would avoid disturbing labor relations in the Wiley plant."

The Brotherhood and Capital anticipated this problem in the drafting of Article 1(b) of their agreement, quoted at page 4 above, which makes the agreement binding upon successors and assigns of Capital in case of a merger by providing that if there were a merger the parties would meet and negotiate the procedure to be followed and the protection to be afforded the employees involved. Furthermore, if the parties were unable to meet such problems under Article 1(b), the problems could be determined by arbitration before an Adjustment Board under Article 4? of the agreement (R. 24, 32).

This statement clearly means that United could have no objection to representation rights for the Brotherhood based on the Brotherhood-Capital agreement of the approximately 2,170 employees covered by such agreement who are admittedly not represented by any union on the property of United. As to the other 530 employees, the Brotherhood recognizes that it cannot seek representation rights based on that agreement if they are represented by another union and it does not in its complaint ask for such rights. The discussion above, pages 33-35, showing that there is no dispute between the Brotherhood and the IAM concerning the representation of these 530 employees makes this fact clear.

United has defeated the machinery thus provided to settle any controversies arising out of the implementation of the Brotherhood-Capital agreement following the merger by refusing to recognize any obligations under the agreement and by refusing to meet with the Brotherhood for such purpose (R. 7, 108, 109, 110).

Third: It is suggested by United that the Brotherhood complaint gives rise to a dispute as to the composition of the craft or class involved. The Brotherhood does not perceive how a decision that United was required to assume the obligations of the Brotherhood-Capital agreement upon the consummation of the merger gives rise to any dispute as to the composition of the craft or class involved. This craft or class was established by the National Mediation Board and the Brotherhood and United are in agreement that all of the approximately 2,700 employees fall within the craft or class so established. The fact that 530 of the total craft or class fall within the ramp and stores group now covered by an IAM-United agreement does not give rise to a dispute as to the composition of the craft or class any more than it gives rise to a representation dispute.

The fact that the National Mediation Board does not have jurisdiction to adjudicate the Brotherhood complaint is also made clear by a reference to the provisions of Section 2, Ninth of the Railway Labor Act and the decision of the National Mediation Board upon the Brotherhood's application for an interpretation of the meaning or application of the Brotherhood-Capital agreement. Section 2, Ninth concerns only disputes "among a carrier's employees as to who are the representatives of such employees." The only dispute here is a dispute, not among employees, but between United and the Brotherhood. Moreover, when the Brotherhood applied to the National Mediation Board under Section 5, Second of the Railway Labor Act for the interpretation of the meaning or application of the Brotherhood-Capital collective bargaining agreement that Board specifically held that "this Board lacks jurisdiction to do anything more by interpretation

than to construe the instrument produced through its mediatory function" (R. 44). The Mediation Board further held that it had no authority "to spell out the rights and obligations of the parties in the situation presented here", i.e., the consummation of the merger between Capital and United (R. 44).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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August 21, 1964

APPENDIX A

STATUTES INVOLVED

Judicial Code

Sections 1331, 1337, 2201 and 2202 of Title 28 of the United States Code (28 U.S.C.A., Sections 1331, 1337, 2201 and 2202):

Section 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

* * * * *

Section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

* * * * *

Section 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

* * * * *

Section 2202:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse

party whose rights have been determined by such judgment."

Railway Labor Act

Sections 2, First; 2, Seventh; 2, Ninth; 5, Second; Section 6 and Section 204 of the Railway Labor Act (45 U.S.C.A., Sections 152, First; 152, Seventh; 152, Ninth; 155, Second; 156 and 184):

Section 2, First:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * * * *

Section 2, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

* * * * *

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent

the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

* * * * *

Section 5, Second:

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

* * * * *

Section 6:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

* * * * *

Section 204:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

Delaware Statute

Section 328 of the Delaware General Corporation Law (8 Del. C., Section 328):

"§ 328. Liability of corporation, etc., impairment by certain transactions.

"The liability of corporations created under this chapter, or existing under the laws of this State or the stockholders, directors or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with the corporation, shall not in any way be lessened or impaired by the sale thereof, or by the increase or decrease in the capital stock of any such corporation, or by the consolidation or merger of two or more corporations or by any change or amendment in the certificate of incorporation."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 31

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, PETITIONER

v.

UNITED AIR LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio (R. 127) is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 131) is reported at 325 F. 2d 576.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1963 (R. 131). The petition for a writ of certiorari was filed on January 31, 1964, and granted on April 20, 1964, 377 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when two air carriers merge, the district courts have jurisdiction to consider the continuing effect upon the survivor of a collective bargaining agreement which had been negotiated with one of the carriers before the merger.

STATUTE INVOLVED

The relevant portions of the Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*) are set out in the Appendix, *infra*.

INTEREST OF THE UNITED STATES

The question posed by this case is whether, following a merger of two air carriers, the district court had jurisdiction to determine the effect upon the surviving corporation of a collective bargaining agreement negotiated pursuant to the Railway Labor Act between the union and one of the predecessor carriers. The courts below held not, on the ground that the suit was, in reality, a representation dispute under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth) and thus within the exclusive jurisdiction of the National Mediation Board. The National Mediation Board, however, is of the view that it lacks authority to resolve the matter. The Board believes (a) that the dispute does not fall within Section 2, Ninth, of the Act and (b) that the proper forum for the resolution of the merits of this dispute is an appropriate adjustment board established pursuant to Section 204 of the Railway Labor Act (45 U.S.C. § 184). Thus, the decision below runs counter to the Board's construction of its own jurisdiction under the Railway

Labor Act. This memorandum is filed in order to explain the Board's position and, more broadly, because it is important to the stability of other agreements negotiated under the Act that there be a determination of the proper forum for the resolution of similar disputes.

STATEMENT

Full statements of the history of these proceedings appear in the briefs of the parties. We confine ourselves here to those essentials which are necessary to provide a sufficient background for the discussion which follows.

The action was brought by the Brotherhood of Railway and Steamship Clerks (the Brotherhood) against United Air Lines (United) to enforce against United a collective bargaining agreement originally entered into between the Brotherhood and Capital Airlines (Capital). The Brotherhood asserts that United, Capital's successor as a consequence of a merger of the two airlines, is bound by this agreement; United, which contends that it is not subject to the agreement, has refused to apply it in any respect whatever to approximately 2,700 employees who were admittedly covered by the agreement while employed by Capital.[1] The Brotherhood seeks declaratory relief and an in-

[1] The 2,700 employees have been divided by United into two units for purposes of labor relations. About 500 of the employees have been placed in a unit represented by the International Association of Machinists, which already contained about 2,200 United employees. The remaining 2,200 Capital employees have been placed in a unit along with 7,800 United employees who are not represented by a labor organization but are governed by United's personnel regulations (R. 51).

junction prohibiting United from refusing to apply the agreement's provisions to the former Capital employees (R. 11).

The merger between Capital and United which gave rise to this dispute was consummated on June 1, 1961, with the approval of the Civil Aeronautics Board (CAB). (33 C.A.B. 307; see Section 408 of the Federal Aviation Act of 1958, 49 U.S.C. § 1378). Previously, in 1947, the Brotherhood had been certified by the National Mediation Board (the Board) under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth) as the representative of Capital's clerical, office, stores, fleet, and passenger service employees (R. 4). The collective agreement between the Brotherhood and Capital covering those employees was executed on August 3, 1959, less than two years before the merger; it provided that all of its provisions "shall be binding upon the successors or assigns of the Company [Capital] and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety (90) days prior to such consolidation or merger, and representatives of the Company and the Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved" (R. 5, 24). The merger agreement subsequently provided that "United * * * shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations * * * and all debts, liabilities and duties of each of the Constituent Corporations shall thenceforth attach to United, and may be enforced against it to the same extent as if said debts, liabilities and duties had been

incurred or contracted by it" (R. 5–6). Despite these provisions, United has consistently taken the position that the Brotherhood-Capital collective bargaining agreement would not survive the merger and that it is free to treat Capital's former employees as though there had been no agreement (R. 6–9).

In light of United's announced position, the Brotherhood requested the CAB, while the merger was pending before it, to "condition" the merger upon United's explicit assumption of Capital's obligations under the collective agreement. The CAB refused to impose such a condition in approving the merger, and ruled that the matter was "a problem to be worked out between the companies and the employees, in accordance with regular procedures applicable to the matter of representation and agreement." 33 C.A.B. 307, 331. Thereafter, shortly before consummation of the merger, the Brotherhood made application to the National Mediation Board for an interpretative ruling regarding the post-merger applicability of the Brotherhood-Capital agreement to United. This application was made under Section 5, Second, of the Railway Labor Act (45 U.S.C. § 155, Second), which requires the Board to give an "interpretation" of "the meaning or the application of any agreement reached through mediation under the provisions of this chapter" upon application by any party to such an agreement. The Brotherhood-Capital agreement of August 3, 1959, had been reached through such Board mediation. (R. 5; see Section 5, First, of the Railway Labor Act, 45 U.S.C. § 155, First.) After a hearing on the Brotherhood's application, the Board,

on August 25, 1961, held that "the language of * * * the [Brotherhood-Capital] agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambigous. In other words, the language means just what it says and we so find" (R. 41, 44). The Board went on, however, to hold that Section 5, Second, of the Railway Labor Act "delegates no authority to this Board to interpret or construe the merger agreement, which is a document foreign to its processes. * * * [T]his Board lacks jurisdiction to do anything more by interpretation than to construe the instrument produced through its mediatory function. * * * In sum, we find that the language is clear and unambiguous but fail to find authority to spell out the rights and obligations of the parties in the situation presented here" (R. 44). Thereafter, United continued to refuse to apply the Brotherhood-Capital agreement to the former Capital employees who were transferred to its employ.

The district court dismissed the Brotherhood's complaint[2] "for lack of jurisdiction" (R. 128), and the court of appeals affirmed (R. 131). Both courts held

[2] Several bases of federal jurisdiction were urged in the complaint filed on November 9, 1961 (R. 3–4). Regardless of the validity of the other bases urged, the suit requests a declaration of the applicability of a collective agreement containing adjustment board procedures as required by Section 204 of the Railway Labor Act (45 U.S.C. § 184). Federal jurisdiction under Sections 1331 and 1337 of the Judicial Code (28 U.S.C. §§ 1331, 1337) would thus seem to exist under the holding of *Machinists* v. *Central Airlines*, 372 U.S. 682.

that the Brotherhood's suit against United was a "representation dispute" under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. § 152, Ninth) and that judicial power was therefore wholly excluded under the doctrine of *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338. This Court granted certiorari (R. 139).

DISCUSSION

1. Contrary to the decisions below, we believe that the present controversy between the Brotherhood and United is not a dispute under Section 2, Ninth, of the Railway Labor Act. That Section provides a means for determining the representative of employees covered by the Act. "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * *" (Section 2, Fourth). When there is a "dispute" "as to who are the representatives of * * * employees," Section 2, Ninth, provides that either party to the dispute may require the National Mediation Board to make an investigation (which may include an election among the employees involved) and to designate and certify the representative. Under the cases cited by the courts below (*Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338), jurisdiction to

determine a representative under this procedure is exclusively committed to the Board. Therefore, if the dispute in this case were over the selection or determination of a representative of United's present employees for purposes of collective bargaining, the Board would clearly have exclusive jurisdiction.

The present dispute, however, does not concern the determination of a representative for the future. This controversy is over the present effect of a contract negotiated by a representative previously selected by Capital's employees under the Section 2, Ninth, procedure. The distinction becomes apparent when it is considered that a separate representation proceeding under Section 2, Ninth, has, indeed, been commenced with regard to the employees in this case. On August 24, 1962, shortly after the district court's opinion was filed, the Brotherhood requested the Board to institute an investigation under Section 2, Ninth, pertaining to the employees presently working at United in the crafts where the Brotherhood formerly represented employees at Capital. That group includes employees who have always been with United and also employees formerly with Capital and allegedly presently covered by the agreement in suit. An election ordered in this unit by the Board pursuant to Section 2, Ninth, has not yet taken place because of litigation over the form and scope of the proposed election.[3] Once the election

[3] R. 135; see *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, 218 F. Supp. 114 (D.D.C.); *United Airlines, Inc.* v. *National Mediation Board*, 330 F. 2d 853 (C.A.D.C.). Petitions for certiorari filed by the Brotherhood, United and the Board are now pending in these cases. (Oct. Term, 1964, Nos. 138, 139 and 369.)

does take place, the representative selected will thereafter be exclusively entitled to represent the employees in the unit for purposes of negotiating with United.

This case relates to the present—the interim status of labor relations *until* an election takes place and a representative is selected under Section 2, Ninth.[4] The dispute is caused by the fact that the unit for which an agreement was negotiated has been divided and absorbed into two larger units in which a new representation proceeding has not yet been concluded. The question here is not who will ultimately be the Section 2, Ninth, representative certified by the Board. Nor is it even what effect a new certification will have upon the old agreement. The question is to what extent the Brotherhood-Capital agreement continues to be applicable to the employment relations between United and the former Capital employees in the period after the merger but before the selection of a representative for the merged unit. The Brotherhood seeks to establish that, regardless of which union, if any, might ultimately be designated to represent United's employees, it was incumbent upon United to

[4] United, however, might potentially seek to terminate the agreement even before the election takes place by filing a notice pursuant to Article 44 of the agreement (R. 36) and Section 6 of the Railway Labor Act (45 U.S.C. § 156). United has not thus far attempted such a termination. Should the election result in the selection of a new representative, that representative and United would seem clearly to have the authority to terminate the Brotherhood-Capital agreement under Section 6. In the event that the election results in the selection of no representative, termination of the agreement according to Section 6 might also be sought.

honor the Brotherhood-Capital agreement at least until that agreement was altered in accordance with the procedures prescribed by the Act (Section 6, 45 U.S.C. 156).[5] The Board's authority under Section 2, Ninth, does not permit it to adjudicate this contractual relationship between employer and union pending the outcome of a representation proceeding.[6]

[5] Among the contractual rights which the Brotherhood asserts that United refuses to honor are "matters relating to seniority, basis of pay; protection against arbitrary discipline and discharge, procedures for the adjustment of grievances and against arbitrary transfer, provisions for the health and safety of employees, and various benefits such as sick leave allowances, overtime allowances, group insurance and pension benefits, maintenance of union membership and check off of union dues" (R. 8).

[6] It might be argued that, since the Capital-Brotherhood agreement was reached through mediation by the Board, the Board may have authority under Section 5, Second, of the Act (45 U.S.C. § 155, Second) finally to declare whether and to what extent the agreement governs United pending the Section 2, Ninth, representation proceeding. As stated *supra*, pp. 5–6, a request that the Board make such a determination was directed to the Board by the Brotherhood. The Board decided, however, that its authority pursuant to Section 5, Second, only extended to construing the agreement reached through its mediation, and did not permit it to decide the effect of a merger upon the continued applicability of the agreement (R. 44). The Board has traditionally taken a narrow view of its function under Section 5, Second, believing that disputes regarding the meaning of agreements should ordinarily be resolved through the appropriate adjustment board provided by Sections 3 and 204 of the Act (45 U.S.C. §§ 153, 204). See, *e.g.*, *In the Matter of Brotherhood of Maintenance of Way Employes and Akron & Barberton Belt Railroad Co.*, reproduced in Interpretations Issued by the National Mediation Board pursuant to Section 5, Second, of the Railway Labor Act, July 1, 1934–June 30, 1961, p. 149. If the Board were

2. Our conclusion that this case does not involve a representation dispute under Section 2, Ninth, does not mean that all the issues are appropriate and ripe for judicial consideration. Section 204 of the Railway Labor Act creates procedures for resolution through arbitration of "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." (45 U.S.C. § 184.) When such disputes arise, they are to be handled "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board * * *." Section 204 places upon "every carrier and * * * its employees, acting through their representatives" the duty

---

of the view that the Brotherhood-Capital agreement were wholly inapplicable to United, it might, nevertheless, have fully resolved this dispute under Section 5, Second. The Board, however, has already expressed its view that, as a matter of the agreement alone, it *is* applicable to United. In so doing, the Board did not mean to foreclose consideration of the extent to which particular portions of the agreement might not be applicable to United in light of the changed circumstances caused by the merger. We urge, on behalf of the Board, that the Board, acting under Section 5, Second, would be an inappropriate forum for the resolution of these questions regarding the specific application of particular provisions of the collective agreement after the merger. The Board believes that the Act commits such questions to an adjustment board created under Section 204, and we so submit, *infra*.

"to establish a board of adjustment" which may be established by "agreement between employees and carriers." Article 43 of the Brotherhood-Capital agreement, which the Brotherhood seeks to enforce against United in this case, established such a board of adjustment (R. 32).

Whether, and to what extent, United is bound by the Brotherhood-Capital agreement pending resolution of the representation proceeding presently pending before the Board are questions plainly appropriate for arbitration by the adjustment board,[7] unless it can be said, out of hand, that the agreement to arbitrate is itself no longer viable because of the merger. The latter question, to be sure, is an issue for judicial determination. However, this Court has already provided an unequivocal answer in other litigation and need only declare its application to this case.[8]

In *John Wiley & Sons.* v. *Livingston,* 376 U.S. 543, a company (Interscience), which was a party to a collective bargaining agreement, merged with another, larger, company (Wiley), whose employees were unrepresented. The suit was to compel Wiley to submit a grievance to arbitration under the collective agree-

[7] The questions raise a "minor" rather than a "major" dispute under the terminology of *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711. See *Auxico Airlines, Inc.* v. *Air Line Pilots Ass'n, Int.,* 331 F. 2d 433 (C.A. 5).

[8] If, as we believe, the law on this point is clear, we suggest that this Court should decide the issue rather than defer pending consideration by the courts below. The dispute has already been long protracted. Cf. *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 508.

ment between the union and Interscience. In language fully applicable to the present case, the Court said (*id.* at 548–551):

> * * * the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and * * * in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.
>
> * * * It would derogate from "the federal policy of settling labor disputes by arbitration," *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same.
>
> * * * * *
>
> The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded. We find none. * * *
>
> We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. * * * [T]here may be cases in which

> the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. So too, we do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known. * * * In addition we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership. * * * This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement.

The present case, in at least two respects, provides an even stronger basis for compelling the surviving company to arbitrate under the collective agreement. United's duty to arbitrate here flows from the Railway Labor Act, whereas in *Wiley* the duty was solely contractual. Here, then, the "preference of national labor policy for arbitration" has found expression in a congressional directive addressed to the very industry involved in the dispute. Here, also, the collective agreement with Capital (embodying the statutory arbitration procedure) expressly provided that it was to govern Capital's successor in a merger; the agreement in *Wiley* was silent in that regard.

We note additionally that the CAB, although fully aware of the problem, did not state any reasons pecu-

liar to its regulation why United should not be bound to arbitrate the applicability of the Brotherhood-Capital agreement under the adjustment board procedure of the Railway Labor Act. It explicitly relegated that question to the "regular procedures" governing labor relations.

It thus seems clear that no principle of law necessarily exempts United from the Brotherhood-Capital agreement, and that the precise extent to which United may be bound is an appropriate question for arbitration under the statutory procedures embodied in that agreement. In these circumstances, the adjustment board has exclusive primary jurisdiction to consider the disputes, *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239; *Order of Conductors* v. *Pitney*, 326 U.S. 561; *Aaxico Airlines, Inc.* v. *Air Lines Pilots Ass'n, Int.*, 331 F. 2d 433 (C.A. 5), subject only to limited judicial review, cf. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601; *Machinists* v. *Central Airlines*, 372 U.S. 682. While the judgments below holding that jurisdiction was wholly lacking should therefore be reversed, judicial consideration of this case at this time should not go beyond a declaration that the dispute between the Brotherhood and United is amenable to arbitration under the adjustment board procedures established pursuant to Section 204 of the Act by the Brotherhood-Capital agreement.

CONCLUSION

We respectfully submit that the Court should reverse the judgment below and remand the cause to

the district court for proceedings not inconsistent with an opinion holding that the dispute between the Brotherhood and United is subject to the exclusive primary jurisdiction of an appropriate adjustment board.

Respectfully submitted.

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AUGUST 1964.

APPENDIX

The relevant portions of the Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended, as set forth in 45 U.S.C. §§ 151–188) are as follows:

SEC. 152 [Sec. 2]. *General duties.*

* * * * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assess-

ments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in

the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * *

SEC. 155 [Sec. 5]. *Functions of Mediation Board.*

* * * * *

Second. Interpretation of agreement.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * *

SEC. 184 [Sec. 204]. *System, group, or regional boards of adjustment.*

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in

this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181–188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151–163 and 181–188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181–188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction. (May 20, 1926, ch. 347, § 204, as added Apr. 10, 1936, ch. 166, 49 Stat. 1189).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 31

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Petitioner,

vs.

UNITED AIR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1964.

No. 31.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Petitioner,

vs.

UNITED AIR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

The Civil Aeronautics Board, under the Federal Aviation Act of 1958, approved the merger of Capital Airlines into respondent United Air Lines, subject to certain labor protective provisions, including arbitration, for the protection of all employees involved in the merger, whether organized or unorganized. Petitioner labor organization, a participant in the merger proceedings, represented certain employees of Capital who were functionally integrated into the larger comparable group of United employees, part of whom were represented by a different labor organization

under separate labor agreement with United. The Civil Aeronautics Board declined to condition approval of the merger on United's assuming the labor agreement petitioner had with Capital, and directed that United proceed to give notice under the labor protective provisions to the Capital employees who would be affected by the loss of representation and labor agreement.

The questions are:

1. Whether under these circumstances either the entire Capital labor agreement or its arbitration provisions are binding on United after the merger.

2. Whether under these circumstances and in light of the Railway Labor Act there is federal jurisdiction, aside from judicial review of the Civil Aeronautics Board merger order, over an action to declare United bound by the Capital labor agreement.

STATUTES INVOLVED.

Involved are Section 408(b) of the Federal Aviation Act of 1958, 72 Stat. 767, 49 U. S. C. § 1378(b); Section 2, Fourth, Ninth and Eleventh, and Section 204 of the Railway Labor Act, 48 Stat. 1187-88, 64 Stat. 1238, 45 U. S. C. §§ 152, 184; Sections 9(a) and 301(a) of the Labor Management Relations Act, 61 Stat. 143, 156, 29 U. S. C. §§ 159 (a), 185(a). The Railway Labor Act provisions, other than Section 2, Eleventh, are set out in an appendix to the Memorandum of the United States as Amicus Curiae. Relevant portions of Section 2, Eleventh and of the other statutory references are set out in an appendix to this brief.

STATEMENT.

This case arises out of the merger of Capital Airlines into respondent United on June 1, 1961. This merger—like all in the air transport industry—was subject to approval by the Civil Aeronautics Board ("C. A. B.") under the provisions of the Federal Aviation Act of 1958 (49 U. S. C. §§ 1301-1542). The order of the C. A. B. approving the merger (33 C. A. B. 307; R. 57) was affirmed by the Court of Appeals on January 25, 1962. *Northwest Airlines* v. *C. A. B.*, 303 F. 2d 395 (C. A. D. C., 1962).

Capital was in serious financial difficulty and bankruptcy was the alternative to merger. The merger was an "emergency crash measure." "Capital is financially *in extremis* and will not survive if the merger is disapproved." 303 F. 2d 395, 397, 398.

Among the factors of concern to the C. A. B. was the impact on Capital's 7,600 employees. The Examiner had found that the merger would protect their jobs and welfare. 33 C. A. B. at 402. The C. A. B. rejected alternative proposals to the merger on the ground that the employees of Capital—among other interests—"have too much at stake to permit this Board to gamble with the future of Capital's system." 33 C. A. B. at 308.

United had advised the C. A. B. that it intended to offer employment to each of Capital's employees at wages and under terms and conditions equal or superior to those enjoyed while employed at Capital. However, United recognized that the C. A. B. would not be satisfied with such general assurances, and agreed to accept labor protective provisions imposed by the C. A. B. as a condition to approval of the merger. 33 C. A. B. at 323; R. 126. These labor protective provisions are imposed by the C. A. B. under the broad authority of Section 408(b) of the Federal

Aviation Act of 1958 (49 U. S. C. § 1378(b)) to condition approval of mergers upon such terms and conditions as it should find to be just and reasonable. See *United States* v. *Lowden*, 308 U. S. 225 (1939).

The labor protective provisions imposed upon United included protection for pay, seniority, pensions and other benefits, dismissal allowances, reimbursement for certain losses and expenses in connection with moving, the requirement for notice and meetings in the event of any proposed changes to be effected by the merger, and ultimate arbitration to resolve any disputes arising under the protective provisions. 33 C. A. B. at 342-47; R. 59-68. The C. A. B. order also retained jurisdiction to make modifications, amendments or additions to the labor protective provisions. R. 59.

The basis for United's assurance to the C. A. B. that the wages and terms and conditions of Capital employees would be equal or superior after the merger was that these Capital employees would come under United's applicable collective bargaining agreements, or under United's uniform personnel regulations if no collective bargaining agreement was applicable at United, and that the wages and other benefits under these agreements and regulations were generally superior to those at Capital. 33 C. A. B. at 362-63. R. 48, 52-53. Another factor was that United intended functionally to integrate operations immediately after the merger, and it would have been impossible to plan and operate efficiently if employees working side by side and performing the same duties were to receive different rates of pay and be subject to different working conditions depending upon whether they were United or Capital employees prior to the merger. R. 48.

The C. A. B. was advised of United's position regarding the integration of Capital employees early in the merger proceedings. The consequence of this position was that

none of the six Capital labor agreements would survive the merger. Although a number of labor organizations participated in the merger proceeding, including many who held labor agreements with Capital, only petitioner Brotherhood objected to United's position and requested the C. A. B. to require United to assume its contract with Capital as a condition of the merger.[1] R. 48-49.

The C. A. B. refused to impose the Brotherhood-Capital agreement on United. Rather, in a statement which recognized that the agreement would not survive, it held that the matter should be handled under its labor protective provisions. The C. A. B. said:

> "It would seem that this matter, on which the examiner did not comment, is one of the matters which should appropriately arise under section 11 [of the labor protective provisions]. That is to say, Capital and United should jointly or severally give at least forty-five days' notice to the *employees who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement.* This would then place the matter as a problem to be worked out between the companies and employees, in accordance with regular procedures applicable to the matter of representation and agreement." 33 C. A. B. at 330-31; R. 49. (Emphasis added.)

Section 11 of the labor protective provisions required the posting of 45 days notice of any change to be effected by the merger, provided for meetings if requested by any employee or authorized representative to settle problems of rearrangement of the employees arising out of the merger, and for arbitration under the labor protective provisions in the event any problem remained unsettled. R. 67-68.

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1. The Brotherhood was the only one of the labor organizations that had no agreement with United; hence it was the only one faced with the loss of collective bargaining status.

The notice required by the C. A. B. was posted by United and Capital. R. 54-56. The Brotherhood thereupon petitioned the C. A. B. for reconsideration of its order in light of this notice, and again asked the C. A. B. to require United to assume the Capital-Brotherhood labor contract. The C. A. B. denied this petition. C. A. B. Order No. E-16802.

The Brotherhood then petitioned the Court of Appeals for the District of Columbia to review the order of the C. A. B. insofar as it refused to impose on United its labor agreement with Capital, and refused to accept certain suggested modifications of the labor protective provisions (C. A. D. C., Case No. 16,360). After denial by the Court of its motion to stay the merger, the Brotherhood again petitioned the C. A. B. for a partial stay of the order approving the merger, and requested the C. A. B. to require United to treat with the Brotherhood as the representative of the employees Brotherhood represented at Capital. The Board denied this petition. C. A. B. Order No. E-16929.

The Brotherhood's petition to review the C. A. B. merger order in the Court of Appeals was consolidated with those of Northwest Airlines, Delta Air Lines and Eastern Air Lines. After requests for extension of time and indefinite postponement in the Court of Appeals, the Brotherhood withdrew its petition on November 6, 1961. R. 50.

Three days later, on November 9, 1961, this action was initiated by the Brotherhood in the district court for the Southern District of Ohio, by the filing of a complaint seeking a declaration that United was bound to the terms of the Brotherhood-Capital labor agreement, and to enjoin United from refusing to apply that agreement to "employees of Capital covered by that agreement who became employees of United upon the consummation of the merger." R. 3-11.

United moved to dismiss the complaint or for summary judgment. The grounds for this motion were: the cause involved a dispute as to who were the representatives under the Railway Labor Act of certain of its employees and hence exclusive jurisdiction lay with the National Mediation Board; if the requested relief were granted United would be required to treat with a bargaining representative for a minority of a craft or class, contrary to the provisions of the Railway Labor Act; the Brotherhood-Capital agreement revealed on its face that it could not legally or practically be applied to less than an entire craft or class; another labor organization had representation rights for part of the group upon which the Brotherhood was seeking to impose its agreement with Capital and hence this other labor organization was an indispensable party to the action. R. 45-47.

The District Court granted United's motion to dismiss, finding in its Order that "this Court is without jurisdiction over the subject matter for the reason that the same relates to a dispute as to who are the representatives under the Railway Labor Act of certain of the employees of the defendant * * * and that exclusive jurisdiction of said dispute is vested with the National Mediation Board. * * *" R. 129.

The Court of Appeals affirmed, relying primarily on the decision of this Court in *General Committee, etc.* v. *M.-K.-T. R. Co.*, 320 U. S. 323 (1943). R. 131.

The facts upon which the Court of Appeals based its determination were set out in affidavits filed by United in support of its motion, and are not in dispute.

The classification of employees which the Brotherhood represented at Capital was known as the craft or class of clerical, office, stores, fleet and passenger service employees, sometimes referred to as the clerical craft or class. The Brotherhood had been certified as the collective representa-

tive of this craft or class at Capital pursuant to a National Mediation Board ("N. M. B.") election held in 1947. Capital maintained collective bargaining relations with the Brotherhood continuously from the time of its certification until the United-Capital merger. R. 102.

The Capital-Brotherhood agreement recited the 1947 N. M. B. election and certification of the Brotherhood as the basis for its recognition by Capital as the "sole and exclusive bargaining agent for all employees" of Capital in the clerical craft or class. (Agreement, Article I(a); R. 23-24.)

Immediately prior to the merger there were approximately 2,700 employees at Capital in the clerical craft or class represented by the Brotherhood as sole and exclusive bargaining agent. The comparable group at United numbered approximately 10,000; the United group had never been organized into a single craft or class as had been the case at Capital. However, part of this group—the cargo clerks and handlers and stockroom attendants—were separately organized as the result of a 1945 N. M. B. election. These two classifications, now known as the ramp and stores employees, have been represented by the International Association of Machinists since 1948 and are now under a single collective bargaining agreement between United and the IAM known as the "Ramp and Stores Agreement." R. 50-51, 71.

Immediately prior to the merger, 2,200 of the 10,000 employees of United in the grouping comparable to the clerical craft at Capital were under this IAM Ramp and Stores Agreement. The remaining approximately 7,800 employees were not represented by a labor organization and were covered under United's personnel regulations. R. 51.

Upon the consummation of the merger, the former Capital employees performing work covered under the

United-IAM Ramp and Stores Agreement came under that contract. Consequently, about 530 of the 2,700 former Capital employees who were represented by the Brotherhood at Capital are now represented by the IAM at United. Letters of Agreement relating to the integration of United and Capital employees under the Ramp and Stores Agreement were entered into between United and the IAM on June 23, 1961. R. 51, 93. All these employees are now members of the IAM. R. 124.

The remaining 2,170 former Capital employees who were represented by the Brotherhood at Capital and who are not under a collective bargaining agreement at United have been integrated into United's system and are now working side by side with the 7,800 unorganized United employees in the same job classifications. All are subject to the same pay schedules, benefits and working conditions established under United's uniform personnel regulations. R. 51-52. All were offered employment with United. R. 126.

The result has been an improvement in the pay and related benefits of these employees. The overall wage scales at United at this time were higher than those which existed at Capital prior to the merger. The maximum vacation for the employees at Capital under the Brotherhood agreement was three weeks per year after 12 years of service—a level reached at United after ten years, where the maximum vacation is 20 days per year. At Capital these employees paid for the entire cost of their uniforms; United paid one-half of the initial cost. United offered these employees a stock purchase plan in which it matches 15% of the employee contribution; Capital had no such plan. United paid one-half of the cost of accident and sickness insurance for these employees; Capital paid none. They received $5,000 of free group life insurance from United and the option to purchase additional life insurance to $10,000; Capital offered them an option to purchase

$7,000 of insurance and provided none free. These employees became eligible to participate in United's retirement income plan which provides more liberal benefits than were available at Capital. In addition, these former Capital employees were given full seniority credit for all prior service with Capital.[2] R. 52.

Two weeks after the district court issued its opinion dismissing the complaint for lack of jurisdiction, Brotherhood filed its application with the N. M. B. under Section 2, Ninth of the Railway Labor Act seeking representation rights for the same craft or class it had represented at Capital, with certain exceptions. A dispute developed between the IAM and the Brotherhood over their respective interests, and subsequently United filed a suit to restrain the N. M. B. from proceeding with an election on the Brotherhood application unless it accorded United status as a party in interest on the issue of the appropriateness of the craft or class and unless the N. M. B. would use a ballot which would allow employees the alternative of voting for no representation. United's complaint was dismissed, and it appealed this dismissal. (C. A. D. C., No. 17,777.) After the dismissal of United's complaint, a group of affected employees brought a similar suit and were granted an injunction against the N. M. B. using a ballot which provided no space for a vote against representation, and the N. M. B. and intervenor Brotherhood, in turn, appealed this decision. (C. A. D. C., Nos. 18,068, 18,072.) These appeals were consolidated and the Court of Appeals affirmed all orders of the District Court. *United Air Lines v. National Mediation Board*, 330 F. 2d 853 (C. A. D. C., 1964). Petitions for writs of certiorari of United, the Brotherhood, and the N. M. B. are now pending. Oct. Term 1964, Nos. 138, 139 and 369.

2. Additional benefits are described in the Initial Decision of the C. A. B. Examiner. 33 C. A. B. at 362-63.

SUMMARY OF ARGUMENT.

The Court of Appeals affirmed the district court's dismissal of the complaint on the ground that the underlying dispute involved a question of representation over which there is no judicial jurisdiction. Petitioner Brotherhood and amicus United States contend that there was jurisdiction, and that *Wiley* v. *Livingston*, 376 U. S. 543 (1964), is dispositive, although they disagree on the relief which that case requires. The Brotherhood argues that its labor agreement with Capital should be binding on United; the United States argues that the system board of adjustment established by that agreement should determine whether and to what extent United is bound by the agreement.

United's motion to dismiss or for summary judgment raised the substantive contention that the agreement did not survive as a matter of contract or law in addition to the jurisdictional point.

I.

The *Wiley* case is distinguishable from the present case in many respects, and a consideration of these differences compels the conclusion that even if there was judicial jurisdiction to consider the substantive issues, neither the Brotherhood agreement in its entirety nor any of its provisions survived the United-Capital merger.

The Brotherhood labor agreement by its terms could not be applied to less than an entire craft or class of employees. Its successor clause did not require that it be binding in case of a merger, but only that negotiations be held to determine the protection to be afforded the employees involved. United did not assume the Brotherhood labor agreement through the merger agreement with Capital.

A. The United-Capital merger—like all airline mergers—was subject to approval by the Civil Aeronautics Board

under the Federal Aviation Act. The Brotherhood participated in the C. A. B. hearings. The C. A. B., as a condition of approval of the merger, imposed labor protective provisions on United for the benefit of all the employees involved relating to such conditions as seniority integration, protection of wage levels, pensions and similar benefits, and provided arbitration machinery to resolve any disagreements. The rationale of *Wiley*—which was to give employees some protection against sudden change in the employment relationship—has no application to a regulated merger of this character. This purpose was served by the C. A. B. conditions.

B. The wages and other conditions of employment at United were superior to those at Capital. Consequently the former Capital employees gained through the loss of the collective bargaining agreement. There is, therefore, no specific issue to submit to arbitration under the adjustment board procedures, and none is claimed in the complaint. The defect is not one of pleading but of substance, and the suggestion of the United States that the Court direct arbitration has no referent, since no arbitrable issues have been identified. Since the Brotherhood has never identified any claims it may have had on behalf of the employees, it has abandoned any right it may have had to arbitration.

C. The merger of two airlines is different in kind than the merger of two publishing firms as in *Wiley*. The United-Capital merger was one of a functional—not merely corporate—integration from the outset, and such an integration could not be accomplished between two airlines if employees performing the same work, side by side, were subject to different wages and working conditions depending on the irrelevant fact of whether they were United or Capital employees before the merger.

II.

A. It has been judicially determined that questions of representation arising under the Railway Labor Act are not justiciable even though they may also involve questions of validity of contract. *Switchmen's Union* v. *N. M. B.*, 320 U. S. 297 (1943); *General Committee* v. *M.-K.-T.*, 320 U. S. 323 (1943); *General Committee* v. *Southern Pacific*, 320 U. S. 338 (1943).

Here the International Association of Machinists claimed bargaining rights over a substantial number of the employees Brotherhood represented at Capital, and upon the effectuation of the merger these employees came under the collective bargaining agreement the IAM had with United. Thus there was an underlying "jurisdictional dispute" with respect to these employees.

The Brotherhood's effort to disavow these employees in its argument—although not in its complaint—is self-defeating, since then it is in effect changing the labor agreement it had with Capital, and this requires it to assert representation rights which it lost when it lost its majority status on consummation of the merger. The amicus memorandum appears to recognize this dilemma, makes no concession to the claims of the IAM, and implies that this may be one of the problems to be submitted to the adjustment board under the Capital-Brotherhood contract. However, this contractual adjustment board was a bipartite board on which only the Brotherhood, not IAM, was represented, there being no national board comparable to the National Railroad Adjustment Board under Title II of the Railway Labor Act.

There was also a dispute as to the identity of the former Capital employees for whom Brotherhood may speak in any event, since approximately 1,150 of the 2,700 employees

Brotherhood represented at Capital became members of Brotherhood under the provisions of a union security agreement between Capital and Brotherhood—an agreement which would violate the Railway Labor Act if enforcement was attempted after the merger.

The pending proceedings before the N. M. B. for representation of an entire craft or class of present United employees made overt what was implicit from the beginning of this litigation—that the underlying dispute involved questions of representation for which there is to be no judicial intervention. Accordingly the decision below was correct.

B. *Wiley* was an action to compel arbitration under Section 301(a) of the Labor Management Relations Act, and it has been judicially determined that federal jurisdiction under that section is not limited to majority representatives. There is no comparable provision in the Railway Labor Act, which is applicable to majority representatives only. Section 204 of the Railway Labor Act, upon which the amicus United States bases federal jurisdiction, is specifically limited to majority representatives. Hence, since Brotherhood no longer claims to represent a majority of the craft or class, there is no basis for federal jurisdiction.

C. The C. A. B. declined to require United to assume the Brotherhood-Capital contract as a condition to approval of the merger, as requested by the Brotherhood. Instead the C. A. B. directed United to give notice to all employees "who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement." The Brotherhood then petitioned the Court of Appeals for the District of Columbia to review the C. A. B. order, raising the same issues raised in this proceeding. The question of the survival of any of the Capital labor

agreements was closely related to other issues in the merger, including the welfare of the Capital employees, and the anticipated savings of the amount of Capital's annual deficit to be realized by consolidation of facilities and personnel at overlapping stations of the two companies. The effect of the Brotherhood-Capital agreement after the merger cannot be considered in isolation from all the other factors leading to approval of the merger. These issues could have been decided by the Court of Appeals for the District of Columbia on Brotherhood's petition to review the C. A. B. order. However, Brotherhood withdrew from that proceeding and three days later started this action. The Court of Appeals subsequently upheld the C. A. B. order on petition of other airlines on January 25, 1962. In addition to the other jurisdictional grounds presented, the Court should hold that jurisdiction is not appropriate in this proceeding since the matter should have been left for determination by the Court of Appeals on petition to review the C. A. B. order on the entire record of the merger proceedings.

ARGUMENT.

United's motion in the district court was in the alternative; that the district court lacked jurisdiction, and that, in any event, the Brotherhood agreement did not survive the United-Capital merger as a matter of law or contract.

In the first section of this Argument we shall demonstrate that the contract did not survive by its terms, nor was it assumed by United, and that there is no overriding federal policy requiring that the contract or its arbitration provisions be binding on United under the circumstances present here. In the second section we shall argue that this action was not justiciable because the underlying dispute was a question of representation under the Railway Labor Act with respect to which there is no judicial jurisdiction, and hence the Court of Appeals was correct in affirming the dismissal; that in any event there is no federal jurisdiction because the Railway Labor Act—the statute under which federal jurisdiction is claimed in this case—applies only to majority collective bargaining representatives, a status the Brotherhood lost on the effectuation of the merger; and finally that there was no original jurisdiction in the district court for the further reason that the issues raised in this proceeding were before the Court of Appeals for the District of Columbia on the Brotherhood's petition to review the C. A. B. order approving the United-Capital merger, and should have been left for determination by that Court.

I.

THE BROTHERHOOD-CAPITAL AGREEMENT DID NOT SURVIVE THE UNITED-CAPITAL MERGER.

The Brotherhood-Capital Agreement was negotiated and entered into on the assumption that Brotherhood would continue to be the "sole and exclusive bargaining agent for all employees in the [clerical] craft or class . . . of the Company." Agreement, Art. I(a), R. 23-24. Its terms and conditions can only be rationalized on that assumption. When this premise fell with the merger of Capital into United, the entire contract fell.

Unless the Brotherhood were the majority representative, the union security agreement it contained (R. 37) would be unlawful. Section 2, Eleventh, of the Railway Labor Act, authorizing such an agreement, clearly contemplates that it shall apply only where the union represents all employees in the craft or class. Provisions such as posting of seniority rosters, displacement rights, preference bidding, transfers and promotions, are meaningful only when applied to all employees similarly situated. Thus, the provisions of the contract show that it was designed only to cover an entire craft or class, not a fraction of a bargaining unit.

Petitioner relies heavily on Article 1(b) which provides that "All provisions of this Agreement shall be binding upon the successors or assigns of the Company" (R. 24), and the National Mediation Board interpretation that this "means just what it says." R. 44. But petitioner glosses over the full significance of the balance of the sentence in which the "successors and assigns" language appears and what the N. M. B. said about that. The sentence continues, "and in case of a consolidation or merger, the Company will notify the Brotherhood at least ninety days prior to

such consolidation, or merger, and representatives of the Company and Brotherhood will meet and negotiate for the procedure to be followed and the protection to be afforded the employees involved." R. 24. The N. M. B. said that this language meant that Brotherhood and Capital "were obligated to meet and treat on specified subjects." R. 45. Thus the agreement does not simply provide—as the Brotherhood would have it—that it was binding in the event of a merger.

What it contemplated was that in the event of a succession in which Capital might remain intact—such as a sale of Capital as a unit without physical integration into another airline, or a change in corporate name or structure—where the basic employing unit would retain its identity, then the agreement would be binding. But where other employees must be considered—as in a consolidation or merger—then the agreement contemplated and provided for "negotiation for the procedure to be followed and protection to be afforded."

Petitioner says Capital never gave it the ninety day notice required by the above-quoted clause. Pet. Br. 5. Yet on November 28, 1960, three months after the merger agreement and six months before the effective date of the merger, Capital and the Brotherhood did meet for the very purpose of complying with this provision. Capital offered to negotiate and asked the Brotherhood for its proposals. The Brotherhood refused to submit any, and never pursued the grievance or arbitration provisions of the agreement to redress any complaint it may have had with respect to Capital's conduct under this provision or to the meaning of the provision. R. 103-5. Brotherhood here seeks to convert a contractual obligation to negotiate which Capital had before the merger to an agreement that all terms of the contract would be binding on United after

the merger. The contract does not support this construction.

United did not voluntarily bind itself to the Brotherhood agreement. The Brotherhood suggests that under the terms of the merger agreement between Capital and United, United assumed the Brotherhood contract. Pet. Br. 2, 19.

The merger agreement did not state that United would assume the Capital labor agreements, and the most that could be contended by Brotherhood is that the merger agreement may have been ambiguous in this respect. But United made its position clear before the C. A. B. long before the merger was consummated.[3] There was no dissent from Capital, the other party to the merger agreement. "The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered." Williston on Contracts, Rev. Ed., Vol. 3, § 623. Brotherhood was certainly not misled about United's intention or the effect of the merger agreement, for it requested the C. A. B. to impose its contract on United "since the merger agreement makes no provision for the continued operation of the Brotherhood-Capital agreement." 33 C. A. B. at 393.

The argument of petitioner and amicus United States is that all these factors were considered in *Wiley* v. *Livingston*, 376 U. S. 543 (1964); and that that decision is determinative of this case. However, they are not in agreement over the reach of that decision or of what disposition it requires of this case. The Brotherhood considers it as

3. The Court of Appeals found that United announced at the outset of the merger proceedings that it would not assume or be bound by any of Capital's labor agreements, that no contention was made that United intended to assume these agreements under the terms of the merger agreement, or that United ever made any representations that it would be bound. R. 133.

authority for the proposition that the entire Brotherhood-Capital agreement survived the United-Capital merger. Pet. Br. 17-18. The United States position is that only the arbitration procedures of that agreement continue viable and that other questions must be settled through that process. U. S. Mem. 11-12.[4]

Wiley held the "disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances present here, the successor employer may be required to arbitrate with the union under the agreement." 376 U. S. at 548.

The clear implication is that there may also be other circumstances in which it may not be appropriate to require arbitration. The implication is spelled out: "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." At 551.

There are, of course, similarities between *Wiley* and the present case. Both involve mergers. Both involve the integration of a smaller group of employees into a larger group. Both involve an existing collective bargaining agreement at the disappearing company at the time of merger. But there are significant differences which lead to the conclusion that although there may have been "im-

4. There appears to be the same difference of opinion between the Courts of Appeal for the Third and Ninth Circuits. *Cf. United Steelworkers* v. *Reliance Universal*, 56 LRRM 2721 (C.A. 3, July 8, 1964), and *Wackenhut Corp.* v. *United Plant Guards*, 332 F. 2d 954 (C.A. 9, 1964). In both cases a business was sold and continued intact. In *Wackenhut* the Court held the successor was bound by the pre-existing labor contract, including the obligation to arbitrate; in *Reliance* the Court held the obligation to arbitrate survived, not necessarily the entire labor agreement, and that an arbitrator could take into account the change in circumstances resulting from the transfer of ownership. Both relied on *Wiley*.

pressive policy considerations favoring arbitration" in *Wiley* which were "not wholly overborne by the fact that Wiley did not sign the contract" (376 U. S. at 550), these considerations are not present here.

The differences between the cases not only establish that *Wiley* is distinguishable but that a different result should be reached in the present case.

A. The Employee Protection Found Necessary in Wiley Was Satisfied by the C. A. B.

The *rationale* of *Wiley* is that since "employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership . . . the objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." 376 U. S. at 549.

But railroad and airline owners may not "independently rearrange their businesses." These rearrangements are subject to prior federal regulation by the Interstate Commerce Commission or the Civil Aeronautics Board. The peculiar public interest with which these vital transportation industries are affected long ago led these agencies to recognize the position of employees in railroad and airline mergers and to accord them full participation in the administrative proceedings and protection as a condition of approval.

In *United States* v. *Lowden*, 308 U. S. 225 (1939), the Court held that under the broad terms of Section 5(4)(b) of the Interstate Commerce Act authorizing the ICC to approve railroad consolidations under conditions it finds

to be just and reasonable, the Commission had the power to impose provisions for the protection of employees. The Court found that the mitigation of hardship on employees in consolidations was appropriately related to the maintenance of an adequate and efficient transportation system. 308 U. S. at 234.[5]

The power of the C. A. B. to impose labor protective provisions under the analogous provisions of Section 408(b) of the Federal Aviation Act has been upheld on the authority of the *Lowden* case. *Western Air Lines* v. *Civil Aeronautics Board,* 194 F. 2d 211 (C. A. 9, 1952); *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C. A. 2, 1953).[6]

The labor protective provisions imposed by the C. A. B. in the United-Capital merger are set out at pages 59 to 68 of the Record. They provide for integration of seniority lists in a fair and equitable manner and arbitration in the event of failure to agree (Section 3); displacement allowance for a period of four years to any employee placed in a worse position with respect to compensation within three years of the merger (Section 4); dismissal allowance based on length of service to any employee deprived of employment as a result of the merger (Section 5);[7] protection "of benefits attaching to his previous employment, such as hospitalization, relief, and the like" (Section 6); moving, traveling and living expenses for employees and

5. The Interstate Commerce Act has since been amended to make specific provision for employee protection in consolidations. Section 5(2)(f), Interstate Commerce Act. This section has been construed as providing the minimal employee protection and not as a limitation on the authority of the ICC to provide conditions beyond its scope. *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 (1950).

6. These cases arose under the Civil Aeronautics Act, the antecedent statute to the Federal Aviation Act, under comparable statutory provisions.

7. Dismissal allowance is a standard C.A.B. protective provision. In this case, however, United offered employment to all former Capital employees. R. 126.

family required to change their residence as a result of the merger (Section 8); protection against loss in sale of home or unexpired lease as a result of change of place of residence because of the merger (Section 9); notice to employees of "proposed changes to be effected by the merger," meeting with employees or representatives on request to settle problems of rearrangement arising out of the merger, and arbitration of any unsettled problems (Section 11); arbitration of any dispute under the protective provisions (other than Section 9 which provides separate appraisal machinery for resolving valuation disputes) (Section 13).

These provisions are applicable to all employees, whether United or former Capital, and whether organized or unorganized. Section 11—under which the C. A. B. directed United to give notice of "change or loss of representation and collective bargaining agreement" (R. 49)—was first adopted by the C. A. B. in the *Delta-Chicago and Southern Merger Case*, 16 C. A. B. 647 (1952), for the express purpose of affording protection to the unorganized Delta employees. Id. at 655. In the United-Capital merger, the C. A. B. stated that Section 11 was applicable to organized and unorganized employees. 33 C. A. B. at 326-27.

Many unions participated in the United-Capital merger proceeding, including the Air Line Pilots Association, Air Line Stewards and Stewardesses Association, Air Line Dispatchers Association, Communication Workers of America, Flight Engineers International Association, International Association of Machinists and petitioner Brotherhood. The C. A. B. gave full consideration to their position concerning protection to be given employees affected by the merger. 33 C. A. B. at 323-31.

Accordingly, the policy of protecting the employees' interest which underlies the *Wiley* decision has been fully satisfied here. Here the merger was regulated, not inde-

pendent; the regulatory agency did protect the employees from the impact of a sudden change in the employment relationship; full arbitration over changes to be effected by the merger was provided; employees did participate in the proceedings leading to the imposition of this protection.

Thus, there is no reason to impose the Brotherhood agreement on United or the former Capital employees, and in fact to do so would not be in their interest.

B. Brotherhood Has Abandoned Its Right to Arbitrate.

The action in *Wiley* was to compel arbitration of specific issues. But the Court said, "... [W]e do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known." 376 U. S. at 551. Since it is the function of the Court not only to decide whether a company is bound to arbitrate but "what issues it must arbitrate" (id. at 546-47), the Court examined these issues to determine whether they were arbitrable. Id. at 552.

The complaint here did not request enforcement of arbitration; it asked that United be required to assume the Brotherhood-Capital agreement and apply it to all former Capital employees covered by its terms who became employees of United upon consummation of the merger.

The complaint does not allege that Brotherhood ever requested arbitration of any provision of that agreement. The only allegation approaching the subject is that "by refusing to accept and process grievances of former Capital employees . . . United has violated the provisions of Section 204 of the Railway Labor Act." R. 10. The complaint does not allege what grievances were refused or on what basis they were refused, nor does anything in the record fill that deficiency.

The absence of allegations concerning arbitration was

no pleading oversight. Rather, it dramatizes the abstract nature of the claim of the Brotherhood, which is all form and no substance. The fact is that there is nothing to arbitrate. The meat of industrial dispute and unrest is not here. The Capital employees gained, they did not lose, because United would not accept the Brotherhood agreement. They got higher wages, longer vacations, better pension benefits, more liberal accident and health insurance, free life insurance and dependency coverage. They have jobs, whereas before they faced imminent loss of employment through the anticipated bankruptcy of Capital. The C. A. B. protected their seniority and provided arbitration procedures in event of disagreement. That is why the Brotherhood raises no specific claims—but only a general plea that its contract be binding on United. If this relief were granted it is highly doubtful that any former Capital employees would view it as a victory.

The United States memorandum attempts to cure the defect in the complaint by suggesting that the Court give the Brotherhood relief for which it did not ask and require the Brotherhood and United to arbitrate under the Brotherhood-Capital agreement. U. S. Mem. 12.

But if no issues have been presented for arbitration to this point, then what shall the Court direct be arbitrated? Certainly the Brotherhood has not raised any specific issue in this case relating to any employee grievance. The employees are apparently satisfied with their improved working conditions, and in any event, had three years in which to protest under the labor protective provisions.[8] The only

8. The labor protective provisions even gave employees a degree of protection against arbitrary dismissal. They provide that a dismissal allowance would not be payable in the event of discharge for "justifiable cause." Sec. 5(c), (i)(5). R. 63, 64. Thus an employee who had been terminated allegedly for cause could contend under these provisions there had not been cause and that he was therefore entitled to a dismissal allowance, and pursue this complaint to arbitration under Section 13 of the labor protective provisions.

apparent grievance, and about the only interest not protected by the C. A. B., was the Brotherhood's loss of its status as collective bargaining agent and consequent loss of the union security agreement it had with Capital.

However, we doubt if the Brotherhood or the United States would suggest that United be required to arbitrate its failure to terminate former Capital employees who stopped paying dues to the Brotherhood, or whether employees hired after the merger would be required to join the Brotherhood as a condition of employment—both required under the Brotherhood agreement. R. 37. Enforcement of these provisions would be contrary to Section 2, Eleventh, of the Railway Labor Act, which restricts union security arrangements and checkoff to the majority representative of the craft or class.

At any time since February 1, 1962, United could have terminated the Brotherhood-Capital agreement on thirty days notice—as the amicus memorandum concedes. U. S. Mem. 9 fn. 4. If United had taken that course, or if it should do so now, how could United be required to arbitrate claims never identified prior to the termination of the agreement?

The United States argues that the arbitration is to deal with what is covered by the agreement or whether the agreement applies at all. But there is no point to arbitrating whether the agreement applies at all when no one would contend that all of its provisions should be applicable, and when neither the petitioner nor any employee has requested either that any particular provision be applied to any particular employee or that there be arbitration as to United's failure to give effect to any particular provision.

In November, 1960—one year before it filed the complaint in this action—Brotherhood and Capital met. The Brotherhood complained that Capital had not negotiated with it

before the merger application was filed. Capital responded that its obligation under Article I(b) of the contract was to meet ninety days before the merger—not before the merger application. Although requested by Capital, Brotherhood refused to submit any proposals for protection of the employees. R. 104-5. If Brotherhood was of the opinion at that time that Capital had violated their agreement, then it should have pursued that protest through the contractual grievance and system board procedures which were unquestionably in effect at that time.

Under the circumstances, it is clear that Brotherhood has no grievances to arbitrate, that if it has it has "fail[ed] to make its claims known," and, in any event, it has "abandon[ed] its right to arbitration." 376 U. S. at 551.

C. There Has Been a Substantial Change in the Employing Enterprise.

Another circumstance looked to by the Court in *Wiley* was the continuity of identity of the employing unit. ". . . There may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make the duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U. S. at 551.

In the year before the merger application, United had operating revenues of $314,050,000, operating earnings of $18,803,000 and flew 4,878,000,000 revenue passenger miles; Capital had operating revenues of $108,488,000—with a deficit of $1,757,425—and flew 1,613,000,000 revenue passenger-miles. 33 C. A. B. at 353. United served 60 cities, Capital 48, and 12 were common to both. After the merger, Capital simply disappeared. Its facilities and employees

were completely absorbed by United and integrated functionally into its system. R. 51-52.

A merger of this nature and magnitude is clearly different in kind from the merger of two publishing companies in the same city.[9]

The United-Capital merger was unique, since as the C. A. B. Examiner found, "for the first time a major air carrier finds itself insolvent and faced with a foreclosure of a creditor's lien on all its flight equipment." 33 C. A. B. at 402. It was also unique in that this was, to our knowledge, the first air line merger in which the systems were functionally integrated from the outset. This kind of integration was essential to reduce the Capital deficit. The elimination of duplicate facilities and personnel alone was estimated to result in an annual savings of $1,908,000, more than the 1959 Capital deficit. Capital had no turbo jet equipment and immediately upon consummation of the merger this service was introduced on the old Capital routes. 33 C. A. B. at 362-363, 400-1.

There was complete loss of identity of the Capital enterprise after the merger and not the "continuity of identity" found in *Wiley*.

Petitioner contends that in other airline mergers the surviving carrier assumed labor contracts of the disappearing company. Pet. Br. 27. The fact is that in airline mergers where the surviving carrier assumed collective bargaining agreements of disappearing carriers, the airlines could not be functionally integrated until these agree-

9. In *Piano Workers* v. *Kimball*, 332 F. 2d 761 (C.A. 7, 1964), a plant in a Chicago suburb was transferred to southern Indiana. The Court distinguished *Wiley* in that circumstance on the ground, inter alia, that the Wiley and Interscience plants were in the same city.

ments were cancelled, and until then the two merging carriers were operated as separate airlines. R 126.[10]

All the factors present here—the protection, including arbitration, accorded employees by the administrative proceeding, the lack of any tangible benefit to the employees involved, the abandonment of arbitration by petitioner, and the lack of substantial continuity of identity of Capital—are persuasive reasons why the Court should not impose any obligation on United arising out of the Brotherhood-Capital agreement, even if the Court should find there was jurisdiction over this action.[11]

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10. In the *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708 (1952), the Air Line Pilots Association asked the C.A.B. to condition the merger on the negotiation of a new contract with ALPA for the reason that it would be impossible to continue a merged operation under separate contracts. 15 C.A.B. at 719. ALPA was correct, since Braniff could not functionally merge until it cancelled the Mid-Continent contract. R. 126.

11. The minority status of the Brotherhood after the merger and the conflicting claims of the IAM for the ramp and stores employees formerly under the Brotherhood contract may also present issues going to the substantive question whether the contract could survive in any event as a matter of law under the Railway Labor Act. In a footnote in *W ley* (376 U.S. 543, 551 n.5) it was pointed out that there—unlike here—there was "no problem of conflict with another union" and that the minority status of the Interscience union after the merger presented no difficulty, citing *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17 (1962). But minority status under the Labor Management Relations Act is not the same as minority status under the Railway Labor Act. Since these issues go primarily to questions of jurisdiction, they are discussed under that heading in the following section of this Argument.

II.

THE COURT OF APPEALS WAS CORRECT IN FINDING THERE WAS NO JURISDICTION.

A. The Underlying Dispute Is Not Justiciable.

The Court of Appeals held that this case "involved a representation dispute and not merely an action sounding in contract," and accordingly affirmed the dismissal of the complaint by the district court. R. 139.

Neither the Court of Appeals nor the district court suggested that the National Mediation Board could determine, under Section 2, Ninth, of the Railway Labor Act, the question of the applicability of the Capital-Brotherhood agreement. What they did hold was that the underlying dispute involved questions of representation and conflicting union jurisdiction, and that these have been reserved for the N. M. B. The fact that the pleading was cast in contract terms was not sufficient to create jurisdiction.

Under the Railway Labor Act, the existence of contractual claims is not sufficient to vest the courts with jurisdiction if the basic dispute concerns "who is entitled to represent the craft, or who are members of it." *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 205 (1944).

This appears clearly from the three leading cases on judicial review under the statute. *Switchmen's Union* v. *N. M. B.*, 320 U. S. 297 (1943); *General Committee* v. *M.-K.-T.*, 320 U. S. 323 (1943); *General Committee* v. *Southern Pacific*, 320 U. S. 338 (1943).

In the *Switchmen's* case, the union argued that its bargaining unit of yardmen for a division of the New York Central could not be swallowed up in a unit of all yardmen because of its contract. It conceded that but for the contract the action of the N. M. B. in finding the system-wide

craft or class appropriate might be proper. The Court of Appeals discussed this issue fully. 135 F. 2d 785, 792 (C. A. D. C., 1943). But this Court held there was simply no judicial jurisdiction, despite the contract issue.

The two *General Committee* cases concerned disputes between the Brotherhood of Locomotive Engineers, representing the engineers, and the Brotherhood of Locomotive Firemen and Enginemen, representing the firemen. The disputes arose out of agreements which the Firemen had negotiated with the carriers concerning the promotion of firemen to engineer positions, which were inconsistent with the method worked out between the carriers and the engineers. The Engineers sued for declarations that the collective bargaining agreements of the Firemen were in violation of the Railway Labor Act, on the theory that the agreements interfered with the Engineers' rights as exclusive bargaining representative for its craft or class.

Again the Court held that the courts were without jurisdiction to consider the action, although plainly here the suits went to the "validity of contract."

In the first *General Committee* case the Court pointed out that controversies could arise with respect to which there was neither an administrative nor judicial remedy. (320 U. S. at 336-37):

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. * * * However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. * * * If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. * * *

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. * * * Courts should not rush in where Congress has not chosen to tread."

The Court did find jurisdiction, in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 (1944), to review a contract which discriminated among members of a craft or class on racial grounds. *Switchmen's* and *General Committee* were distinguished (323 U. S. at 204-5):

> "The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act * * * or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration * * *. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board." (Citing *Switchmen's Union* and the *General Committee* cases.)

A recent decision of the Court of Appeals for the Fourth Circuit, *Division No. 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (C. A. 4, 1962), cert. denied 369 U. S. 885 (1962), discussed the "validity of contract" theory in connection with a dispute arising out of the merger of the Virginian Railway and the Norfolk & Western Railroad. There the Interstate Commerce Commission, which has authority to approve railroad mergers, had left to the bargaining representatives the integration of seniority of

the affected employees. The telegraphers of each railroad were represented by the Order of Railroad Telegraphers—Division 13 of the ORT representing the Virginian telegraphers, and Division 14, ORT representing the Norfolk & Western telegraphers. The two Divisions were unable to agree on an integration plan, and the national president of the ORT then entered into a collective bargaining agreement with the merged railroad, compromising the positions of each of the Divisions. Division 14 then brought suit to enjoin the railroad from acting under this agreement, relying on the union constitution and the provisions of the collective bargaining agreement between Division 14 and the Norfolk & Western relating to seniority rights of men on newly acquired lines. In holding that it lacked jurisdiction to reach the merits of the controversy, the Court stated:

> ". . . [I]n view of the General Committee cases, the conclusion is inescapable that district courts have no such authority where 'validity' of the contract depends upon the merits of a representation dispute." 298 F. 2d at 20.

Hence if there is here a "jurisdictional dispute," a question of "who is entitled to represent the craft" or "who are members of it" (*Steele*, 323 U. S. at 205), then there is no jurisdiction even though the complaint may claim that "validity of contract" is the issue.

The complaint requests that United be enjoined from "continuing its refusal" to apply the Brotherhood-Capital agreement "to employees of Capital covered by that agreement who became employees of United upon the consummation of the merger." R. 11. The International Association of Machinists claims that 530 of these 2,700 employees are under its contract, and states it has no intention of giving up this claim (R. 124-125)—despite the

statement of its general counsel that "IAM has no interest and no desire to be a party to the litigation." (R. 122.)

Brotherhood attempts to avoid this obvious jurisdictional conflict by arguing that this "is a controversy which United has created in order to defeat the rights of all the employees involved." Pet. Br. 34. This controversy was not created by United. Brotherhood knew long before the merger was effectuated that the IAM claimed jurisdiction over some of the Capital employees then under contract with Brotherhood. The IAM participated in the merger proceedings before the C. A. B. and one of its representatives testified concerning these employees:

> ". . . Without getting into a jurisdictional battle, we would like to welcome the ramp and stores employees on Capital Airlines who are now covered by a BRC [Brotherhood] agreement into the IAM where the IAM similar employees are covered by an IAM agreement." R. 125.

Subsequent developments in this dispute demonstrate that the IAM has not accomplished this without its jurisdictional battle. Shortly after the district court dismissed Brotherhood's complaint in this case, Brotherhood started a representation proceeding before the N. M. B. seeking to represent the entire clerical craft or class at United.[12]

The IAM is a party to that proceeding before the N. M. B. Although Brotherhood professed to have no quarrel with the IAM before the district court in this proceeding, the tune is somewhat different now.

In a letter to the N. M. B., Brotherhood charged the IAM with "collaborating with the management of United." On its part, the IAM advised the N. M. B. that the Brotherhood was raiding the IAM and threatened to institute

12. This was the subject of subsequent litigation which is now pending before this Court on petitions for certiorari. Nos. 138, 139, 369 (supra, p. 10).

formal proceedings against Brotherhood under the AFL-CIO Constitution. No. 139, J. A. 47, 51.

The Brotherhood complaint here made no exception for the 530 employees who had been under the United-IAM agreement for over four months at the time the complaint was filed.[13] The IAM has stated that it has no intention of giving up its right to represent these employees. R. 125.

In its brief, Brotherhood implies that it is disavowing any claim for representation rights respecting these 530 employees. Pet. Br. 37. It says that it is asserting no rights independent of its own agreement and that it only "seeks to establish rights under that agreement, not to negotiate a new agreement." Pet. Br. 35.

The conflict between Brotherhood's complaint and its argument presents, however, a dilemma it cannot avoid. For if it asks that its contract be applied to all former Capital employees—as it does in its complaint—then the jurisdictional dispute with the IAM is patent. But if it excludes the 530 employees claimed by the IAM, then Brotherhood is in substance renegotiating that agreement by modifying the craft or class it purports to cover. This means that Brotherhood is asserting its prior representation rights to modify the Capital contract and cannot continue to claim that it is merely seeking to enforce that contract. In short, a Brotherhood contract without the ramp and stores employees is a different contract from the one set out in the Brotherhood complaint.[14]

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13. The complaint was filed on November 9, 1961. R. 3. On June 23, 1961, IAM and United executed a Letter of Agreement covering the integration of former Capital employees into the IAM Ramp and Stores Agreement. R. 93. Brotherhood was invited to participate in negotiations leading to this integration but refused. R. 94.

14. This is brought into focus by a situation which could arise under the contract bar rules of the National Labor Relations Board, which permitted an election for a new bargaining repre-

The United States meets the problem head on. It concedes nothing to the position of the IAM. "The question is to what extent the Brotherhood-Capital agreement continues to be applicable to the employment relations between United and the former Capital employees in the period after the merger but before the selection of a representative for the merged unit." U. S. Mem. 9.

Presumably, the United States would leave the problem of the Brotherhood-IAM conflict to an adjustment board, following the lead of *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950). U. S. Mem. 15. But the jurisdictional conflict in that case could be referred to the National Railroad Adjustment Board, which was in a position to give

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sentative after the second year of a long-term labor contract. It was possible to have a new bargaining representative elected for a part of the bargaining unit only, while the remaining employees were still represented by the old union, and, presumably, still under the prior unexpired contract. It has been suggested that in this situation the remaining employees might argue the entire contract should terminate, and not merely as to the severed group of employees. The reason advanced is that the negotiation of new terms for the removed employees would disturb intraplant relationships which had previously existed among all classifications under contract, and might require different terms for the remaining employees to retain the balance. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 11 (1958).

The force of this argument is well illustrated by the circumstances here. The clerical craft or class includes a wide variety of job classifications ranging from janitor to auditor and chief accountant. R. 24-29. The ramp and stores employees are not among the highest rated classifications under the craft or class. When these employees became part of the IAM classification upon effectuation of the merger, they received an improvement in wages and working conditions. If the Brotherhood contract were binding for the remaining classifications, these would suffer a relative reduction in benefits vis-a-vis the ramp and stores employees. Other considerations raised in this brief aside, it would be inequitable to permit United to insist that it pay these remaining employees the lower wages and benefits provided under the Capital contract, while paying the ramp and stores employees at the relatively higher levels.

complete relief since as a national board its jurisdiction covered both unions.[15] Although a comparable national board of adjustment is authorized under Title II of the Railway Labor Act for airlines, it has not yet been established. See *I. A. M.* v. *Central Airlines*, 372 U. S. 682, 685-6 (1963). The adjustment board which the United States refers to here was a contractual bipartite board on which Brotherhood, and not the IAM, had representation. R. 32. And the adjustment board under the IAM Ramp and Stores agreement would exclude Brotherhood.[16] R. 79.

Thus the only possible forum for resolution of the underlying representation dispute is the National Mediation

15. There is considerable doubt whether the kind of jurisdictional dispute involved here would in any event be referable to an adjustment board, even one national in scope. The basic conflict between the IAM and Brotherhood arises not out of contract but out of a different historical development of bargaining relationships at Capital and United, reflected in different N.M.B. unit determinations at the two carriers. See supra, pp. 7-8. This kind of conflict can only be ultimately resolved by the N.M.B. *cf. Carey* v. *Westinghouse*, 375 U. S. 261 (1963).

16. The difference between the authority of the National Railroad Adjustment Board and a system adjustment board is illustrated by *Order of Railroad Telegraphers* v. *Union Pacific R.R.*, 231 F. Supp. 33 (D.C. Col., 1964). A dispute between the Telegraphers and Brotherhood arose over the assignment of certain work and the Telegraphers submitted a claim to the National Railroad Adjustment Board that the assignment was a violation of its labor agreement. The Board made Brotherhood a party to the proceeding and ultimately found for the Telegraphers, who instituted this action in the district court to enforce the award. The court granted the carrier's motion to dismiss on the ground that the Brotherhood—which had not been made a party to the court action—was an indispensable party as it had been to the National Railroad Adjustment Board proceeding. The question of the lack of an indispensable party was also raised here in United's motion to dismiss. The district court commented that it felt "constrained to observe that despite its own protestations we fail to see how this action could be consummated without joinder of the International Association of Machinists." In view of the dismissal on jurisdictional grounds, this was dictum, and the district court so noted. R. 128.

Board, and this is where the issue now lies and should properly be concluded.

The United States argues that the pendency of the N. M. B. proceeding demonstrates that the instant case does not involve a representation dispute. U. S. Mem. 8. The N. M. B. proceedings, however, made obvious what was implicit in this action from the beginning. In *Ruby* v. *American Airlines*, 323 F. 2d 248 (C. A. 2, 1963), cert. den. 376 U. S. 913 (1964), the Air Line Pilots Association sought to compel the airline to bargain with it as the designated representative under the doctrine of *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, (1937). About two months after the action was started, another organization petitioned the N. M. B. for representation rights. The district court held there was no jurisdiction and the Court of Appeals affirmed.

> "... [T]he courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth—a development which became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April." 323 F. 2d 248, 255.

The "inevitable prospect" here was apparent even before Brotherhood started this action. Its campaign to organize the entire group of employees, including those it represented at Capital, started prior to the merger, and it utilized the various proceedings it instituted before the C. A. B., N. M. B., Court of Appeals for the District of Columbia, and this action as part of its organizing campaign by publicizing the proceedings through handbills to all United employees. R. 53, 99. It filed its representation petition with the N. M. B. on August 24, 1962—two weeks after the district court issued its opinion dismissing

the complaint and five days before the entry of its formal order. R. 127, 129. This development was as certain here as it was in the *Ruby* case, and the result here should be no different because Brotherhood petitioned the N. M. B. after, and not before, the district court manifested its intent to dismiss the complaint.

In addition to the jurisdictional dispute arising out of the ramp and stores employees, there is another problem of "who are members of the craft or class," under the Capital agreement which cannot be judicially determined.

The Brotherhood-Capital agreement contained a union security provision which required all employees in the craft or class hired after February 1, 1959, to become and remain members of the Brotherhood as a condition of employment. R. 38-40. From that date to the date of the merger approximately 1,150 employees were hired by Capital who were subject to the union shop provision. R. 102. There is thus no way of knowing who is voluntarily under the Brotherhood agreement and who is not. Under the holding of *International Ladies' Garment Workers' Union* v. *N. L. R. B.*, 366 U. S. 731 (1961), there is considerable doubt whether the Brotherhood may continue to claim contractual rights after it lost its status as majority representative for employees who became members of the Brotherhood under the compulsion of a union security provision in effect when Brotherhood was the sole and exclusive bargaining representative of the entire craft or class at Capital.

These are questions which have not been delegated to the judiciary for resolution. "Congress * * * chose not to leave their solution to the courts." *General Committee* v. *M.-K.-T.*, 320 U. S. 323, 336 (1943).

B. There Is No Federal Jurisdiction Because of the Minority Status of Brotherhood.

The Brotherhood represented 2700 employees at Capital. The comparable group at United totaled 10,000. After the merger the groups were completely integrated, and Brotherhood asserts rights on behalf of a group which is now a minority.

The same situation prevailed at the Wiley publishing firm after the Interscience merger. In *Wiley*, it was held that the Interscience union's minority status at Wiley did not prevent it from representing the employees under the Interscience contract under which Wiley's duty to arbitrate arose. 376 U. S. at 551 n. 5.

Wiley was a suit to enforce arbitration under Section 301 of the Labor Management Relations Act. The action here arises under the Railway Labor Act, and Section 301 is not applicable. There is no equivalent provision in the Railway Labor Act. *International Association of Machinists* v. *Eastern Airlines*, 320 F. 2d 451, 455 (C. A. 5, 1963); *Bruno* v. *Northeast Airlines*, 229 F. Supp. 716 (D. C. Mass., 1964). Hence, Brotherhood's conclusion that *Wiley* settles the minority status question in this case (Pet. Br. 20, 35-36) is hardly warranted. Examination of the authorities compels precisely the contrary inference.

Wiley relied on *Retail Clerks* v. *Lion Dry Goods*, 369 U. S. 17 (1962), in support of the holding that a minority union could bring a Section 301 action under the Labor Management Relations Act. In *Lion Dry Goods* the Court concluded that the phrase "labor organization representing employees" in Section 301(a) of the LMRA did not mean exclusive bargaining representative. "Had Congress thought that there was any merit in limiting federal jurisdiction to suits on contracts with exclusive bargaining

agents, we might have expected Congress explicitly so to provide, for example, by enacting that § 301(a) should be read with § 9(a)." 369 U. S. at 29. Section 9(a) of the NLRA provides for the selection of exclusive bargaining representatives by the majority of employees in an appropriate unit, and is the analogue of Section 2, Ninth, of the Railway Labor Act. *N. L. R. B.* v. *Jones & Laughlin*, 301 U. S. 1, 44 (1937).

The Court also added in *Lion Dry Goods*, in support of its conclusion that minority unions could proceed under Section 301(a) of the LMRA, that Section 8(f), added by the 1959 amendments to the Act, "contemplates contracting with unions that would not represent a majority." 369 U. S. at 29.

But Section 204 of the Railway Labor Act—under which the United States says federal jurisdiction would "seem to exist" in this case (U. S. Mem. 6 n.2), and under which it suggests United should be required to arbitrate with Brotherhood (U. S. Mem. 11-12)—has been limited by Congress in precisely the manner which the Court said in *Lion Dry Goods* would indicate a Congressional intent to exclude minority unions from the purview of federal jurisdiction.

Section 204 provides:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, *selected in accordance with the provisions of this title*, to establish a board of adjustment . . ." (Emphasis added.)

Representatives "selected in accordance with the provisions of this title" can only be the representatives selected by the majority of the craft or class, under Section 2, Fourth and Ninth of the Act, for these are the only provisions in the Railway Labor Act for the selection of representatives.

Comparable language restricting the meaning of "representatives" to the majority representatives is found in other sections of the Railway Labor Act. Section 2, Eleventh, which authorizes union shops, refers to "representatives duly designated and authorized to represent employees in accordance with the requirements of this Act." Section 3, Second, authorizes railroads and "representatives selected in accordance with the provisions of this Act" to establish carrier, system or group adjustment boards.

This difference between the two statutes is not a legislative oversight. In 1934 the Railway Labor Act was substantially amended. The right of employees to organize and bargain collectively was clarified. The National Railroad Adjustment Board and National Mediation Boards were created. The disputes settlement machinery of Section 2, Ninth was added. 48 Stat. 1185.

The draftman of the 1934 amendments was Joseph B. Eastman, Federal Coordinator of Transportation, and he testified extensively at Congressional hearings on the proposed legislation. His comments on the amendments have been accepted as authoritative by this Court. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 302-3 (1943).

During the hearings, railroad spokesmen suggested amendments to Commissioner Eastman's draft, which would have, in his opinion, provided for recognition of minority unions. Commissioner Eastman vigorously objected:

> ". . . Recently the idea has emerged, and apparently it is the idea behind these railroad amendments, that organizations representing the minority as well as the majority ought to be recognized. In any class or craft, therefore, part of the employees might be represented by a national union, if this idea prevailed, part by a

company union and still another part by a communist organization.

" . . . Any class or craft of employees cannot deal effectively in parts with an employer. Our Civil War was fought over a similar issue, and I see no good reason for encouraging the theory of secession in labor organization. If the majority of the employees want to have a company union, that ought to be the representative organization, and I do not favor compelling the company to deal also with a national union representing a minority. The same principle applies when the situation is reversed." Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73d Cong. 2d Sess., p. 146.

The suggested amendments were not adopted.

The constitutionality of the new amendments was sustained in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937). In discussing the "limited duties" imposed on the carrier by the provisions of the amended Section 2, the Court stated these provisions "impose on petitioner [railroad] only the affirmative duty of 'treating with' the authorized representatives of its employees for the purpose of negotiating a labor dispute." 300 U. S. at 557.

In commenting on the duty of a carrier once a representative had been selected, the Court stated:

"The obligation imposed on the employer by § 2, Ninth to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. *It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.*" 300 U. S. at 548. (Emphasis added.)

The Court quoted in a footnote, with apparent approval, a note in the brief of the United States, which intervened as

amicus, to the effect that once a majority representative had been selected "the carrier cannot make with anyone other than the representative a collective contract • • • whether the contract covers the class as a whole or a part thereof." However, if a majority representative had not been selected, then the carrier "is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions." 390 U. S. at 548-49 n.6.

Thus the Court held that the compulsion of the amended Railway Labor Act for a carrier to bargain with or contract with a labor organization extended only to the majority representative, and that when such a representative was selected, the carrier could contract with no other. When no representative had been selected, the carrier could voluntarily contract with anyone for any group—but this could not be compelled under the Act.

When Brotherhood lost its majority status on the consummation of the United-Capital merger it lost its status as a representative under the Railway Labor Act. It cannot now maintain a federal action absent diversity to enforce a contract which no longer has status under the Railway Labor Act.

The action cannot be saved—as the amicus tries—by basing federal jurisdiction on Section 204 of the Act and changing the nature of the relief sought, since that section also is applicable only to adjustment boards established with majority representatives.[17] Here federal jurisdiction has been limited "to suits on contracts with exclusive bargaining agents." *Retail Clerks* v. *Lion Dry Goods*, 369 U. S. 17, 29 (1962).

17. In *I.A.M.* v. *Central Airlines*, 372 U. S. 682 (1963), the I.A.M. was the certified bargaining agent for the craft or class—hence the requirements of Section 204 were met. Thus that case did not reach the point raised here. Cf. Pet. Br. 29-30.

C. The Contract Question Should Have Been Left With the Court of Appeals for the District of Columbia.

There is a separate and independent reason for affirming the dismissal of the complaint.

It may be an interesting exercise in legal conceptualism to treat this case as a simple contract question, or as a matter of Delaware corporation law, or as a problem in statutory construction in comparing Section 301 of the Labor Management Relations Act with Section 204 of the Railway Labor Act. But the case is really about the United-Capital merger. The issue of the survival of the Brotherhood-Capital labor agreement cannot be realistically isolated from the host of economic and legal issues which surrounded the merger of United and Capital. The impact of alternatives on Capital's employees was an obvious factor in the decision of the C. A. B. to approve the merger. United's assurances that all Capital employees would be offered employment with United on terms equal or superior to those they enjoyed at Capital certainly was a material consideration in the C. A. B. determination.

Equally significant was the finding that the integration of operations and employees at the 12 points in common to both airlines would result in an annual savings in excess of Capital's deficit in the year preceding the merger hearings. For if United was bound to assume this agreement, it might not have been able to consolidate employees at the overlapping stations. It certainly could not have assured the C. A. B. that Capital employees would receive an improvement in wages and benefits upon the effectuation of the merger, for then it would have been required to apply the lesser benefits of the Brotherhood contract. It is possible that if it proceeded at all it could only operate Capital as a separate system until the Brotherhood contract could be terminated in February 1962—the experience

of other airlines in similar circumstances. R. 126. The savings which the C. A. B. anticipated as a result of consolidation of operations might not have been realized.

This is not to say that the issue of the existing bargaining relationships at Capital was not a factor appropriate for the C. A. B. in passing upon the merger. Other unions also had problems: The Communications Workers were concerned that United might contract out work formerly done by Capital (33 C. A. B. at 389); the Flight Engineers were concerned about protecting their contractual right to move into pilot jobs (33 C. A. B. at 390). But all these issues were part of a larger whole, and the only forum in which they could be fully aired was the C. A. B.

We are aware that counsel for the C. A. B. stated to the Court of Appeals for the District of Columbia in response to Brotherhood's motion to stay the order approving the merger that the C. A. B. did not "purport to pass on the issue of whether United would be justified, as a matter of contract or labor law, in ignoring the agreement." R. 49-50.

But although the C. A. B. may not have passed on that issue directly, the inevitable consequence of its direction to United that notice be given to employees "who will be affected as a result of the merger by a change or loss of representation and collective bargaining agreement" (33 C. A. B. at 331) was that these employees did lose their collective bargaining agreement when United posted such a notice. Brotherhood knew this and it immediately petitioned the C. A. B. to reconsider once the notice was posted (*supra*, p. 6).

Indeed, Brotherhood raised all these questions before the Court of Appeals for the District of Columbia on its petition to review the C. A. B. order. There is no doubt that that Court could have considered every issue raised in this

litigation. But it would have done so on the entire record before the C. A. B. and not in isolation.

The action of the Brotherhood here is in reality a collateral attack on the C.A.B. order approving the merger. Under the Federal Aviation Act, the procedure for review of that order was that initially followed by Brotherhood: to petition the Court of Appeals, which had "exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator." Section 1006(a), (d), 49 U. S. C. § 1486. See *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (Ga., 1962).[18]

The Court of Appeals decision upholding the United-Capital merger on petition of other airlines was handed down on January 25, 1962. 303 F. 2d 395 (C. A. D. C., 1962). But by then Brotherhood was long gone, having withdrawn its petition in November, so that it could start this litigation three days later.

By now the labor protective provisions have run their course, the protected period having expired on June 1, 1964. The employees have been enjoying the higher wages, longer vacations and other benefits for over three years without complaint. Had the Court of Appeals held United bound to the Brotherhood agreement, the agreement could have been cancelled in February, 1962.

The decision of the Court below should be upheld for the reason—among the others here set forth—that Brother-

18. This was a suit by a group of employees to restrain the airline and union from putting into effect a collective bargaining agreement which adversely affected their employment relationship. The agreement was the outgrowth of proceedings before the C.A.B. The court held that the action was in substance a challenge of C.A.B. orders, and that exclusive jurisdiction to review the orders was with the Court of Appeals. Cf. *Southern Pilots Association* v. *C.A.B.*, 323 F.2d 288 (C.A.D.C., 1963), cert. den. 376 U.S. 954 (1964).

hood abandoned its claim when it withdrew its petition from the Court of Appeals for the District of Columbia. The Brotherhood has taken advantage of the privilege of litigation for its own purposes—certainly not for the interest of the former Capital employees who only gained by the "loss of collective bargaining agreement" which the Brotherhood here seeks to impose on them and United.

CONCLUSION.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Federal Aviation Act—

Section 408(b), 49 U. S. C. § 1378(b):

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe. . . ."

Railway Labor Act—

Section 2, Eleventh, 64 Stat. 1238, 45 U. S. C. § 152, Eleventh:

"Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days fol-

lowing the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner. . . ."

Labor-Management Relations Act—

Section 9(a), 61 Stat. 143, 29 U. S. C. § 159(a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of of employment, or other conditions of employment:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Section 301(a), 61 Stat. 156, 29 U. S. C. § 185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

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No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

UNITED AIR LINES, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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October 16, 1964

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REPLY BRIEF FOR PETITIONER

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, petitioner in the above-entitled cause, submits this reply to the brief of respondent and the memorandum of the United States as *amicus curiae*.

REPLY TO BRIEF OF RESPONDENT UNITED AIR LINES

The primary thrust of United's brief is not directed to sustaining the judgment of the Court of Appeals upon the ground set forth by that Court. Both the District Court and the Court of Appeals held that the Federal courts did not have jurisdiction of the subject matter of the complaint because it related to a dispute between the Brotherhood and United as to who are the representatives under the Railway Labor Act of certain of the employees of United so that exclusive jurisdiction of the subject matter is vested in the National Mediation Board under Section 2, Ninth of the Railway Labor Act. (R. 129, 136, 137.)

United now concedes that neither the Court of Appeals nor the District Court had suggested that the National Mediation Board could determine the question of the applicability of the Brotherhood-Capital agreement. (Resp. Br. 30.) It argues, however, that this Court should nevertheless affirm the judgment below because either the agreement did not survive the merger, or the Court Appeals for the District of Columbia had exclusive jurisdiction of the issue, or, finally, that there is no forum in which the Brotherhood can litigate the issue.

United's brief confirms the position of the petitioner as set forth in its brief (pages 21-28) that the survival of the collective bargaining agreement upon the consummation of the merger has, from the very beginning, been the basic issue in the dispute between the Brotherhood and United and that the complaint did not concern any controversy as to representation over which the National Mediation Board had jurisdiction.

Before turning to a consideration of United's argument, there is one other general observation which should be made with respect to the carrier's brief. Throughout the brief, United weaves into its arguments in one form or another the contention that the former Capital employees covered by the collective bargaining agreement in question, who became employees of United upon consummation of the merger, are better off under the unilaterally imposed regulations of United than they would be if any of their rights under the collective bargaining agreement are preserved. The argument ignores the fact that United's assertions are contradicted on the record. Paragraph 7 of the Affidavit of Mr. Charles L. Dennis, then a Vice Grand President of the Brotherhood and now Grand President of that organization, filed in the proceedings in the District Court, specifically denies the validity of United's assertions and sets forth the injury to the employees involved as a consequence of United's refusal to recognize any of their rights under the collective bargaining agreement. (R. 110-112.) The argument also ignores the fact that before the District Court United conceded that these matters were not of legal significance in the case (R. 110) and the Court of Appeals correctly held to the same effect. (R. 135, footnote 2.)

I

REPLY TO UNITED'S ARGUMENT THAT THE BROTHERHOOD-CAPITAL AGREEMENT DID NOT SURVIVE THE UNITED-CAPITAL MERGER.

United in its brief (pages 17-29) advances a number of reasons in support of its argument that the judgment of the Court of Appeals should be affirmed because the Brotherhood-Capital agreement did not

survive the merger of Capital into United. These arguments are discussed below:

A. United's Argument That the Brotherhood-Capital Agreement Did Not Survive the Merger as a Matter of Federal Law.

This Court in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), held that as a matter of Federal law the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by that agreement. United's brief argues (pages 21-29) that this holding is not applicable to the Brotherhood-Capital agreement because of alleged differences between the situation in the Wiley-Interscience merger as compared to the United-Capital merger. The various phases of this argument are discussed below:

1. United's argument that the imposition of employee protective conditions by the Civil Aeronautics Board in approving the United-Capital merger satisfied the objectives of national labor policy underlying the decision in Wiley & Sons.

United argues (pages 21-24) that the imposition of employee protective conditions by the Civil Aeronautics Board in its order approving the merger of Capital into United meets the objectives of national labor policy which were set forth by this Court in *Wiley & Sons* as the basis for its holding that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all of the rights of the employees covered by the agreement. This argument is wholly without merit for the following reasons:

First, the Civil Aeronautics Board itself stated that its decision, which included the employee protective conditions upon which United relies, left the question of whether United was justified in ignoring the Brotherhood-Capital agreement to private litigation between the parties. (R. 50.) If the Board's order had had the broad effect for which United now contends, the Board would have obviously have so stated rather than advising that the parties should settle this matter between themselves as a matter of contract or labor law. Moreover, until now it has been United's position that continued effectiveness of the Brotherhood-Capital agreement could not be resolved under the Federal Aviation Act. (See page 26, *infra.*)

Second, the protective conditions imposed by the Board are not intended to secure to employees adversely affected by an airline merger the rights which those employees have under their collective bargaining agreement. The purpose of such conditions is basically to alleviate the adverse effects of displacements or dismissals from employment which may occur regardless of whether their contract rights are or are not continued by guaranteeing to the employees a minimum income for a limited period. While some of the benefits enjoyed by the employees involved prior to the merger are continued under such conditions for a limited time, not only are such rights limited in time but they cannot be equated with many of the contract benefits listed in the Affidavit of Mr. Dennis (R. 112).

Third, United's argument is simply an argument to the effect that the imposition of employee protective conditions supersedes private agreements between a carrier and its employees. The lack of validity of this argument is clearly demonstrated by the language of

the last sentence of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C.A. Section 5(2)(f), which specifically provides that the mandatory imposition of such conditions in railroad mergers shall not operate to extinguish the provisions of private agreements between carriers and their employees pertaining to the protection of the employees. It can hardly be contended that the voluntary imposition of such protective conditions by the Civil Aeronautics Board under a general statutory provision authorizing the Board to impose reasonable terms and conditions upon its orders approving airline mergers has a broader effect than the mandatory imposition of such conditions pursuant to Federal statute.

Fourth, United's argument is inconsistent with the practice in the case of mergers and consolidations in both the railroad and airline industries by which labor agreements continue in effect, although the Federal agency involved imposes employee protective conditions in approving such transactions. *City of Nashville* v. *United States,* 155 F. Supp. 98 (D.C. M.D. Tennessee, Nashville Division, 1957), aff'd Per Curiam 355 U.S. 63;[1] *Norfolk & Western Railway Company—Virginian Railway Company—Merger,* 307 I.C.C. 401;[2]

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[1] Reference is made to Finding No. 15 (155 F. Supp. 102, 103) and the conclusions set forth at 155 F. Supp. 105 of the three-judge statutory court affirming the orders of the Interstate Commerce Commission approving the merger of the NC&StL into the L&N. These findings and conclusions specifically recognize that the agency's orders approving the merger, which include employee protective conditions, do not supersede rights under collective bargaining agreements.

[2] Reference is made to the assumption by the Norfolk & Western of the collective bargaining agreements of the Virginian Railway upon the merger of the two carriers, quoted at R. 113, which was a part of the record before the Commission in approving the merger.

Colonial-Eastern Acquisition Case, 23 C.A.B. 500 (1956).[3]

Fifth, United's motion to the District Court to dismiss the complaint or to grant it summary judgment (R. 45, 46) did not include any contention that the imposition of employee conditions by the Civil Aeronautics Board in effect superseded the Brotherhood-Capital agreement. (R. 45, 46.) The fact that after more than three years, United has suddenly come up with a new reason for depriving the employees involved of their contract rights, strongly suggests a lack of confidence in the merits of the reasons it has heretofore advanced in support of its position.

2. United's argument that the Brotherhood-Capital agreement did not survive the United-Capital merger because there was a substantial change in the employing enterprise.

United argues (pages 27-29) that the holding in the *Wiley & Sons* case does not preclude a holding that the Brotherhood-Capital collective bargaining agreement automatically terminated upon the United-Capital merger because of (a) the magnitude of such merger, and (b) the fact that Capital disappeared after the merger and its facilities and employees were completely absorbed by United. United asserts that a merger of this nature and magnitude is different from that involved in *Wiley & Sons.*

The mere fact that Capital and United were both larger companies than Interscience and Wiley ob-

[3] Reference is to Joint Exhibit No. 19 in the record of that proceeding providing for the assumption by Eastern of the collective bargaining agreements of Colonial upon the merger of those two air carriers appearing in the record at R. 117, 118; Affidavit of Charles L. Dennis, R. 113.

viously cannot serve as a basis for a holding that the Interscience agreement did not automatically terminate upon merger, whereas the Capital agreement did. This basic principle of law cannot rest upon the number of employees or the volume of business of the merged companies.[4]

Aside from the difference in the size of the companies involved, the record does not disclose any basic differences in the circumstances. In each case there was a collective bargaining agreement between a union and the company which subsequently merged itself into another company; the surviving corporation was the larger of the two companies; the employees involved became the employees of the surviving corporation; the business and operations of the non-surviving corporation were continued by the surviving corporation.[5]

United stresses that Capital disappeared after the merger. So did Interscience.

United emphasizes that it integrated the employees of the two companies, by which it simply means that some of the employees involved were assigned to stations on United's system prior to the merger. The decisions in *Wiley & Sons* do not indicate precisely the assignment of the Interscience employees by Wiley after the merger. However, United cannot, by its own unilateral decisions and actions with respect to the Capital employees, terminate the collective bargaining

[4] While Interscience and Wiley were much smaller companies than either Capital or United, they did conduct an annual business together of more than ten million dollars.

[5] United continued to fly Capital's routes, the only difference being that the planes were now United planes rather than Capital planes.

agreement. Otherwise, the continuance of the collective bargaining agreement and the rights of the employees thereunder is no longer a matter of law but rests in the sole discretion of the surviving corporation.

3. United's argument that the arbitration provisions of the Brotherhood-Capital agreement cannot be enforced because the Brotherhood has abandoned the right to arbitrate thereunder.

The memorandum for the United States as *amicus curiae* suggests that this Court should reverse the judgment below on the ground that the dispute between the Brotherhood and United is subject to the exclusive primary jurisdiction of an adjustment board created by Article 43 of the Brotherhood-Capital agreement. In this brief, *infra*, pages 28-35, the Brotherhood sets forth the reasons why a decision by this Court should not be so limited. United argues that the Brotherhood is not entitled to even such limited relief because it asserts (pages 24-27) that the Brotherhood has abandoned a right to arbitrate under the provisions of Article 43 of the collective bargaining agreement.

United argues (page 24) that the Brotherhood complaint in the District Court did not request enforcement of arbitration under Article 43, but rather that United be required to assume all of the obligations of the Brotherhood-Capital collective bargaining agreement. Paragraph 25 of the complaint (R. 10) alleged that United had violated the provisions of Section 204 of the Railway Labor Act by refusing to accept and process grievances in accordance with the collective bargaining agreement. The Brotherhood's prayer for relief to the District Court (R. 11) requested, *inter*

alia, that the District Court declare the legal rights of the parties with respect to the agreement. This obviously included the provisions of Article 43. Likewise, the prayer for relief asked the District Court to declare that United was bound by the provisions of the agreement and to enjoin that carrier from refusing to apply those provisions. Here, again, this included the provisions of Article 43 of the agreement. While it is true that the allegations of violations of the agreement were not limited to Article 43 nor was the request for relief limited to the enforcement of that Article (R. 9-11), that fact would not preclude the enforcement of Article 43 at this time either alone or along with other provisions of the Brotherhood-Capital agreement.

United argues (pages 24 and 25) that the Brotherhood is not entitled to the enforcement of Article 43 because the complaint does not allege that the Brotherhood has ever requested any arbitration of the provisions of that agreement. Paragraph 25 of the complaint, as indicated above (R. 10), alleges that United had violated its legal obligations by refusing to accept and process grievances of former Capital employees submitted to it in accordance with the provisions of the Brotherhood-Capital agreement. United contends that it is necessary for the Brotherhood to list each individual grievance and the specific grounds for refusal of each grievance. The Brotherhood submits that it is not required in seeking United's compliance with provisions of Article 43 to specify and spell out each individual grievance, particularly in the light of the carrier's position, which it continues to assert, that Article 43 terminated with the merger.

The complaint (R. 3-11) sets forth in detail the facts that the Brotherhood, beginning a few days after it

first learned of the merger agreement and continuing on up until the time that the complaint was filed, continuously tried to get United to assume the obligations of the Brotherhood-Capital agreement upon the consummation of the merger and to comply therewith, and that United consistently refused stating that the agreement automatically terminated upon the consummation of the merger. United does not suggest that its refusal to accept and process individual grievances under the agreement and to comply with Article 43 was based on any different ground.

United also argues that at any time after February 1, 1962, it could have terminated the Brotherhood-Capital agreement by the filing of a 30-day written notice of such intention,[6] and that therefore it cannot now be required to arbitrate claims never identified prior to termination of the agreement. United has, of course, not filed such a notice because to do so would involve a recognition on its part that the agreement continued after the merger. Moreover, even if United should now file such a notice, its obligations under the agreement would not terminate as of that date because it would have to first exhaust the procedures set forth in Section 6 of the Railway Labor Act with respect to such notice. During this period when the agreement has been in effect, unless terminated by the merger, United has been put on notice of specific claims through the filing of grievances which it refused to accept and process. (R. 10.)

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[6] Article 44 of the agreement provides that it was to continue in effect until February 1, 1962, and "thereafter unless thirty (30) days written notice is served by either party signatory thereto as provided in the Railway Labor Act, as amended." (R. 36.)

Finally, United argues that the Brotherhood has abandoned the right to enforce Article 43 because it should have pursued its protests under that Article with Capital while the agreement was unquestionably in effect. There are a number of answers to this contention. The grievances invoking Article 43 which United has refused to accept and process are based upon actions of United and not upon actions of Capital. At most, the Brotherhood could have only processed grievances against Capital arising out of that carrier's violation of Article 1(b) of the agreement in not giving the required notice and not conducting negotiations in accordance with the last clause of that Article. A decision on such violations would not have decided the question of United's duty to assume the obligations of the agreement after the merger. The rights of the Brotherhood and its employees against Capital were separate and distinct from the rights asserted against United.[7]

4. United's argument that the Brotherhood-Capital agreement did not survive the merger because of provisions of that agreement.

United argues (page 17) that the Brotherhood-Capital agreement was entered into on the assumption that the Brotherhood would continue to be the sole and exclusive bargaining agent for all of the employees in the craft or class involved and that when this premise fell with the merger the entire contract fell. How-

[7] Since United's motion to dismiss the complaint in the District Court did not give rise to this question, the record does not disclose whether or not the Brotherhood did or did not attempt to invoke Article 43 with Capital. United, therefore, has no basis in the record for asserting that it did not. It would be shown, if this were of legal significance, that the Brotherhood did attempt to invoke Article 43 with a joint communication to Capital and United, dated May 29, 1961, and was unsuccessful.

ever, the contract which was the subject of litigation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, also provided that the union involved should be the exclusive bargaining agent of the clerical and shipping employees of Interscience.[8] Yet, this Court held that such contract did not automatically terminate upon the merger of Interscience into the Wiley company in spite of the fact that thereafter the union did not represent the majority of the bargaining unit.[9]

United presents a variation of this same argument in its contention (page 17) that the union security provisions of the Brotherhood-Capital agreement cannot survive the merger because Section 2, Eleventh of the Railway Labor Act contemplates that such an agreement shall apply only where the union represents all the employees in the craft or class. The assumption that the union security provisions of the agreement cannot survive the merger because the Brotherhood no longer represents the majority of the craft or class is essentially the same assumption underlying the general argument that the entire agreement could not survive the merger. This argument, as we have seen, has been rejected by this Court.

B. United's Argument That the Brotherhood-Capital Agreement Did Not Survive the Merger as a Matter of Contract Law.

I. United's argument based on provisions of the Brotherhood-Capital agreement.

United argues (pages 17 and 18) that Article 1(b) of the collective bargaining agreement (R. 24) did not contemplate that the collective bargaining agreement

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[8] This finding of fact appears in the opinion of the District Court in that case at 203 F. Supp. 171.

[9] See petitioner's brief, page 35, and the references there made to this Court's conclusions in *Wiley & Sons* as reported in 11 L.Ed. 2d at page 905.

should be binding upon a successor or assign of Capital in the case of a merger, but only that in the event of such transaction Capital was required to meet with the Brotherhood and treat on specified subjects, i.e. the procedure to be followed and the protection to be afforded the employees involved. United also suggests that the Brotherhood did not adequately pursue this requirement.

This argument ignores the fact that the obligation to meet and negotiate with the Brotherhood in the event of a consolidation or merger is set forth in Article 1(b) in the conjunctive and follows after a statement without qualification that all provisions of the agreement shall be binding upon successors or assigns of Capital. It is clearly an additional obligation imposed in the event of a consolidation or merger arising out of a recognition that in such circumstances the best interests of all the parties is served by such negotiations. United's argument also ignores the fact that the National Mediation Board, in the exercise of its jurisdiction under Section 5, Second of the Railway Labor Act to interpret the meaning of the Brotherhood-Capital agreement executed in mediation proceedings under the auspices of that Board, found that the provision in Article 1(b) that the agreement shall be binding upon successors and assigns of Capital "is clear and unambiguous" and that "the language means just what it says." (R. 44.)

United's suggestion (page 18) that the Brotherhood made no adequate effort to obtain compliance with the provision for negotiations pursuant to the last clause in Article 1(b) is refuted by the uncontradicted facts of record that the Brotherhood promptly sought to

implement the contractual provisions through negotiations with Capital and/or with United and that both carriers refused (R. 7, 108, 109), and that when Capital finally did meet with representatives of the Brotherhood following Civil Aeronautics Board hearings on the merger transactions, Capital's officer in charge of the matter advised that the carrier could not negotiate any arrangements which would be binding upon United. (R. 109.) The entire record in this case bespeaks the fact that both Capital and United rejected the Brotherhood's request. Capital's position was that the merger transaction left it no freedom of action and United's position was that it had no obligations of any kind under the Brotherhood-Capital agreement.

2. United's argument that it did not assume the obligations of the Brotherhood-Capital agreement in the merger contract.

Paragraph 10 of the complaint (R. 5, 6) alleges that United assumed the obligations of the Brotherhood-Capital agreement under Section 3, paragraph 1 of the merger contract.

United argues (page 19) that it did not voluntarily bind itself to the Brotherhood-Capital agreement. This argument ignores the provisions of the merger contract with Capital, quoted at page 5 of petitioner's brief, under which United subjects itself to "all debts, liabilities and duties of each of the Constituent corporations" and further provides that such liabilities and duties may be enforced against United to the same extent as if they had been incurred or contracted by United. (R. 5, 6.)

United suggests (page 19) that this assumption of liabilities was not applicable to the collective bargaining agreement involved because United consistently stated its intention not to assume the obligations of

such agreement, and that this announced intention constituted an agreed-upon interpretation of the contract between Capital and United. United could hardly change the provisions of its merger contract in such fashion. Moreover, both United and Capital were Delaware corporations and the law of that State, quoted at page 5 of petitioner's brief, also provided that a merger did not extinguish the liabilities of the corporations involved or the rights or remedies of persons doing or transacting business with said corporations. Finally, the assumption by United of the obligations of Capital is but a reflection of the general rule cited by this Court in *Wiley & Sons*, 11 L. Ed. 2d 904, footnote 3, that in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears. This general rule is also cited by the United States Court of Appeals for the Ninth Circuit in its decision in *Wackenhut Corporation* v. *International Union, United Plant Guards of America*, 332 F. 2d 954.[10]

II

REPLY TO UNITED'S ARGUMENT THAT THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE DISTRICT COURT HAD NO JURISDICTION OVER THE SUBJECT MATTER OF THE COMPLAINT.

A. United's Argument That the Dispute Between the Brotherhood and United Is Not Justiciable.

United's brief argues (pages 30-39) that the judgment of the Court of Appeals was correct because the dispute between the Brotherhood and United is not

[10] Paragraph 11 of the complaint (R. 6) also alleges that United violated the provisions of Delaware General Corporation Law in refusing to assume the obligations of the Brotherhood-Capital agreement. United's brief does not address itself to this point. This State statutory provision is consistent with the national labor policy set forth in the *Wiley & Sons* decision.

justiciable. United concedes that the National Mediation Board would have no jurisdiction to determine the question of the applicability of the Brotherhood-Capital agreement to United. (Resp. Br. 30.) However, it says that underlying this dispute was a controversy concerning the representation of certain of the former Capital employees taken over by United with the consequence that the dispute concerning the applicability of the agreement is not justiciable.

The representation dispute which United asserts underlies the question of the applicability of the agreement is an alleged dispute between the Brotherhood and the International Association of Machinists (IAM) respecting the representation of approximately 530 employees out of the 2700 Capital employees covered by the Brotherhood-Capital agreement. In its brief (pages 34, 35) the Brotherhood pointed out that there has been no dispute between the Brotherhood and the IAM concerning the representation of these 530 employees on the property of United and that the IAM agrees that there is no such dispute. Such a dispute would exist only if the Brotherhood sought to have declared invalid the agreement of June 23, 1961, attached to United's affidavits filed in the District Court, under which the employees involved were placed under the IAM-United basic collective bargaining agreement. The Brotherhood did not ask the District Court to declare this agreement invalid and it has not asked anybody to so declare.

United suggests in its brief (page 35) that the Brotherhood must have a dispute with the IAM over the representation of these employees because if it does not, it is seeking to enforce an agreement different from the one set out in the complaint in the District

Court. However, as petitioner's brief points out (page 34) the complaint seeks to establish that United's obligations under the Brotherhood-Capital agreement did not terminate upon the consummation of the merger on June 1, 1961, and that United assumed the obligations of such agreement on that date. Thus, the Brotherhood does seek to enforce the agreement. If United at some point subsequent thereto in accordance with the provisions of the Railway Labor Act took action placing a portion of the employees involved under another agreement, the Brotherhood's enforcement of the Brotherhood-Capital agreement as to those employees up to that date would not involve any representation dispute with any other organization nor would it involve enforcement, as United alleges, of a different contract. The reason for this is that change in representation rights does not change contract rights. Even if all 2700 of the employees involved were represented on United by the IAM, both United and the IAM would have an obligation under the Railway Labor Act to continue the rights of those employees under the Brotherhood-Capital agreement until such time as the IAM and United, in accordance with the provisions of that statute, substituted different contract rights. Such has been the administration of the Railway Labor Act for more than 30 years by the National Mediation Board, as clearly appears at pages 24 and 25 of its published document, entitled "Administration of the Railway Labor Act by the National Mediation Board, 1934-1957". The Board there states that a change in representation does not bring about a change in contract rights until the agreement is changed in accordance with the provisions of the Railway Labor Act. Its statement on this point reads as follows:

"*Change of representatives under existing agreements.*—When there is an agreement in effect between a carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management under the existing agreement. *If a change in the agreement is desired, the new representatives are required to give due notice of such desired change as provided by the agreement or by the Railway Labor Act.* Conferences must then be held to agree on the changes exactly as if the original representatives had been continued. *The purpose of such a policy is to emphasize a principle of the Railway Labor Act that agreements are between the employees and the carrier, and that the change of an employee representative does not automatically change the contents of an agreement.*" (Emphasis supplied.)

This fact has been recognized in every railroad and every airline merger up to this time.

The application of this principle to the 530 ramp and stores employees placed under the IAM-United agreement on June 23, 1961, is obscured by the dates involved. If this action had not taken place for a year, then it would be clear that these employees had rights under the Brotherhood-Capital agreement prior thereto. On the other hand, if the action had taken place on June 1, 1961, then any rights of these employees under the Brotherhood-Capital agreement would not have continued.

In the latter situation, it would be clear that this fact would not prevent the Brotherhood from enforcing the agreement as to the other approximately 2170 employees involved. The fact that the action took place on June 23, 1961, does not prevent the Brotherhood, contrary to United's contentions, enforcing the agreement as to these employees. Nor does it prevent the Brotherhood from obtaining a declaratory judgment that the agreement would not expire as to any of the 2700 employees on June 1, 1961.

United's brief (page 34) refers to the pending application of the Brotherhood to the National Mediation Board for a certification to represent the craft or class of employees of United, of which the employees here involved are a part, as evidence of a jurisdictional dispute between the Brotherhood and the IAM. It also cites certain portions of the record in Cases Nos. 138, 139 and 369 before this Court, involving separate litigation concerning this application in support of its contentions. The memorandum of the United States (pages 8, 9) correctly points out that this application has no bearing upon the present litigation because it involves only the question of future representation and does not affect the existing rights of either the Brotherhood or the employees it represents under the Brotherhood-Capital agreement. Moreover, the original Brotherhood application excluded the ramp and stores employees of United and these were included in the application only after United, by letter of September 7, 1962, requested a dismissal of the application on the ground that it covered only a part of a group of the employees constituting the craft or class followed thereafter by a similar objection from the IAM. The Brotherhood's statement to the National Media-

tion Board that the IAM was "collaborating with the management of United by also raising the question as to the appropriateness of the craft or class", quoted in part in United's brief (page 34), referred only to these requests.[11] The IAM states that there is no dispute between it and the Brotherhood in the subject matter of the present litigation. (R. 122.)

United's brief makes reference to the decision in *Ruby* v. *American Airlines*, 323 F. 2d 248 (CA 2, 1963), *cert. den.* 376 U.S. 913, as supporting its position. However, this case related to the duty of an employer to negotiate a new contract in a situation where there was a representation dispute covering the employees involved. It has no application to United's obligation to recognize rights under the existing Brotherhood-Capital agreement. (See *John Wiley & Sons, Inc.* v. *Livingston*, 11 L. Ed. 2d 898, at page 905.)

United suggests (page 39) that the issues raised by the complaint are not justiciable for the additional reason that the Brotherhood-Capital agreement contained a union security provision so that it is not possible to now ascertain which Capital employees covered by the agreement voluntarily joined the Brotherhood and which did not, and it contends that there is doubt as to whether the Brotherhood may enforce the agreement with respect to employees who joined the union under the compulsion of the union security provision. The rights of the employees under the agreement are not dependent upon their membership in the Brotherhood. United's argument thus is essentially that the Brotherhood may not enforce those rights because it has lost its status as the majority representative. This argument is dealt with *infra*, pages 22-24.

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[11] Case No. 139, J.A. 38, 39, 44, 47-49.

B. United's Argument That There Is No Federal Jurisdiction Because of the Minority Status of the Brotherhood.

United's brief argues (pages 40-44) that the Brotherhood-Capital agreement terminated with the consummation of the United-Capital merger because thereafter the 2700 employees involved were a minority of the entire craft or class on United. The brief recognizes (page 40) that this Court held in *Wiley & Sons* that Interscience's union minority status at Wiley did not prevent it from representing the employees under the Interscience contract following the merger of Interscience-Wiley. However, United says that a different rule must be established here because the *Wiley* case arose under Section 301 of the Labor-Management Relations Act while the present suit arose under the Railway Labor Act.

United argues that the union was able to bring a suit to enforce the contract involved in the *Wiley & Sons* case even though it had a minority status in the Wiley company because Section 301 of the Labor-Management Relations Act permits suits by minority representatives. United contends on the other hand that if the relief requested by the Brotherhood were granted United would be required to treat with a representative of a minority of a craft or class of its employees and that under the Railway Labor Act it may be compelled to deal only with a representative designated by the majority of such employees. United says that it could voluntarily treat with the Brotherhood for the employees involved but that it cannot be required to do so.

United cites in support of its contention provisions of the Railway Labor Act which contemplate that collective bargaining agreements shall be made between

carriers and the representatives of a majority of the craft or class, the legislative history of such provisions, and the decision in *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, to the effect that where a majority representative exists a carrier subject to the Railway Labor Act must treat with that representative but that if no majority representative has been selected the carrier is free to make a contract with anyone it pleases and for any group it pleases within the craft or class. The provisions of the Railway Labor Act cited by United as well as the *Virginian* decision all deal with the problem of the duty of a carrier subject to the Railway Labor Act in negotiating a new agreement with representatives of its employees. A similar requirement exists in Section 9(a) of the Labor-Management Relations Act (with the special exception of employees engaged in the building and construction industry covered by Section 8(f) which is given special treatment because of its unique position). Consequently, the fact that United cannot be compelled to make a new agreement with a representative of a minority does not in and of itself establish that the carrier cannot be compelled in a suit by that representative to assume obligations under an already existing agreement.

United's argument really boils down to a contention that the suit may not be brought because there is no provision similar to Section 301(a) in the Railway Labor Act. This argument ignores the fact that the Brotherhood itself has rights under the agreement and it would also give rise to a situation where although the agreement did not terminate with the merger of Capital into United, the latter could escape obligations thereunder because a suit to enforce obligations

would have to be brought by a particular employee dealing only with one very narrow segment of the agreement. Such suits would be precluded by the potential expense and the ever-present fear of the employer. This Court, in its decision in *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682, recognized that a suit by employee representatives would lie in the Federal court to enforce a Railway Labor Act contract. There is no reason to restrict that right like the one here involved to a majority representative where the suit does not seek the negotiation of a new agreement, but asserts rights based upon an existing collective bargaining agreement. This Court in *Wiley & Sons*, 11 L. Ed. 2d at page 905, pointed out that it was not deciding a union's right to claim continued status following a change in ownership, but it was enforcing rights growing out of the existing agreement.

Finally, United's brief concedes (page 44) that the Brotherhood could maintain an action based on diversity of citizenship. Paragraph 2 of the complaint (R. 3) based jurisdiction in part upon Section 1332 of Title 28 of the United States Code and alleged that full diversity of citizenship existed between the Brotherhood and United. Thus, assuming *arguendo* that United's argument is sound, there was jurisdiction in the District Court.

C. United's Argument That the Question of the Applicability of the Brotherhood-Capital Agreement After the Merger of Capital Into United Should Have Been Left With the Court of Appeals for the District of Columbia Circuit.

United's brief argues (pages 45-48) that the issues presented by the complaint could have been litigated before the United States Court of Appeals for the District of Columbia Circuit on appeal from the order of the Civil Aeronautics Board which refused the request of the Brotherhood to include as a condition of the agency's approval of the United-Capital merger the assumption by United of the obligations of the Brotherhood-Capital agreement. United asserts that the Court of Appeals for the District of Columbia could have considered every issue raised in this litigation and that as a consequence the Brotherhood abandoned its claim when it withdrew its petition with the Court of Appeals for the District of Columbia.

It should first be observed that United did not request the District Court to dismiss the complaint upon this ground. (R. 45, 46.) Nor did it seek to sustain the judgment of the District Court and the Court of Appeals on this ground as is clearly apparent from the decision of the Court of Appeals. (R. 131-138.) The suggestion first appeared in its brief in opposition to the petition for certiorari (page 16) and then only in the form of a contention that the Brotherhood did have a forum other than the District Court to resolve the dispute with United. Thus, United has made this argument for the first time only after some three and a half years after the Board's order was issued and after the Brotherhood commenced its efforts to enforce the Brotherhood-Capital agreement. If there has been any abandonment of a claim, it has been the abandonment by United of this argument.

The Brotherhood tried to obtain a judicial determination that the Brotherhood-Capital agreement was binding on United following the merger in the proceedings before the Civil Aeronautics Board. When the Board declined to impose a condition directing United to assume the obligations of the agreement, the Brotherhood did seek review of the Board's order for the purpose of obtaining such a judicial determination. However, the Board specifically advised the District of Columbia Court of Appeals that it had not passed on the issue of whether United would be justified as a matter of contract or labor law in ignoring the agreement. (R. 50.) It was thus clear that the Brotherhood could not obtain a judicial determination by the District of Columbia Court of Appeals of the continued effectiveness of the Brotherhood-Capital agreement. It therefore sought to do so by filing an application with the National Mediation Board for an interpretation of the agreement and when that Board held that it did not have jurisdiction to determine the question, the Brotherhood filed the present action.

The Board's declination to pass upon the issue was in response to an argument made by United in its brief, dated January 23, 1961, to the Board (page 36) in which United stated "the legal question as to the effectiveness of Capital's collective bargaining agreements is not one for resolution by the Board under the Federal Aviation Act." United's present argument is directly inconsistent with this position.

It is thus clear that the complaint in the District Court is not a collateral attack on the Civil Aeronautics Board order approving the merger. The Department of Justice, which has the duty of defending Board

orders, would be the first to advance this claim if it had any substance.

Nor is United helped by the decision in *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407, cited at page 47 of its brief. In that case, the plaintiffs brought an action in a Federal district court to enjoin Southern Airways and the Air Line Pilots Association from putting into effect a collective bargaining agreement which the complaint alleged had been entered into pursuant to orders of the Civil Aeronautics Board. The complaint alleged that the orders of the Board were invalid and hence the agreement was invalid. The District Court correctly held that validity of an order of the Civil Aeronautics Board could be challenged only before an appropriate Court of Appeals. If anything, the litigation of which the *Holman* case was a part supports the position of the Brotherhood because the District of Columbia Court of Appeals subsequently held that the petition before it sought, not to challenge the Board orders, but to obtain a declaration as to the validity of the collective bargaining agreement to which Holman, et al., objected. *Southern Pilots Assoc.* v. *C.A.B.*, 323 F. 2d 288, *cert. den.*, 376 U.S. 954. In the present case, the Brotherhood has not challenged directly or indirectly the Board orders. It seeks only to enforce the Brotherhood-Capital agreement. The District Court is the proper forum for such an action.

REPLY TO MEMORANDUM FOR THE UNITED STATES

The United States has filed a memorandum as *amicus curiae*. In this memorandum, the United States agrees with the position of the Brotherhood that the District Court and the Court of Appeals erred in deciding that the controversy between the Brotherhood and United concerned a representation dispute over

which the National Mediation Board has exclusive jurisdiction under Section 2, Ninth of the Railway Labor Act. The United States agrees that the controversy is over the present effect of a contract negotiated by a representative previously selected by Capital employees and that the District Court has jurisdiction to entertain the complaint. The United States, therefore, urges this Court to reverse the judgment below and to remand the cause to the District Court.

The memorandum of the United States, however, takes the position that the adjustment board provided for by Article 43 of the Brotherhood-Capital agreement (R. 32) has exclusive primary jurisdiction of the dispute between the Brotherhood and United over the present effect of the Brotherhood-Capital agreement. It, therefore, suggests that judicial consideration of the case at this time should not go beyond a declaration that the dispute between the Brotherhood and United is amenable to arbitration under such adjustment board. The Brotherhood submits that judicial consideration of the case should not be so limited and that it is entitled to a declaratory judgment that the Brotherhood-Capital agreement did not terminate upon consummation of the United-Capital merger but continued in full force and effect and was binding upon United. The Brotherhood sets forth the following reasons in support of this position as against the limited relief urged by the United States:

A. The Decision in Wiley & Sons Does Not Preclude the Grant of Relief Requested by the Brotherhood.

This Court, in the *Wiley & Sons* case, held that a collective bargaining agreement of Interscience covering employees of that company did not automatically terminate upon the merger of Interscience into the

Wiley Company and that the union was entitled to arbitrate with Wiley Company several issues relating to the obligation of the Wiley Company to the former Interscience employees under such agreement. The action was one only to compel arbitration and this Court was not called upon to limit the relief in a situation like the present one where the Brotherhood seeks to enforce the collective bargaining agreement. Moreover, the agreement in that case had expired while the Brotherhood-Capital agreement is still in full force and effect if it was not terminated by the merger. (R. 36.)

B. The Merger Contract Provided That United Would Assume All the Debts, Liabilities and Duties of Capital.

Section 3, paragraph 1 of the merger contract between Capital and United, provided that United would assume all the debts, liabilities and duties of Capital and that these could be enforced against United to the same extent as if said debts, liabilities and duties had been incurred or contracted by United. No sound reason exists why the obligations and duties of Capital under its collective bargaining agreement with the Brotherhood should be removed from the liabilities and duties which United had assumed under the contract. That carrier's declaration after the agreement was signed and before the Civil Aeronautics Board approved the merger that it would not assume the obligations of the Brotherhood-Capital agreement does not change the effect of its contract with Capital. The decision in *Wiley & Sons* also does not deal with any such provision.

This is a matter for judicial determination and not arbitration under the Brotherhood-Capital agreement.

C. Delaware Law Required United to Assume the Obligations of the Brotherhood-Capital Agreement.

Both Capital and United were Delaware corporations and their merger agreement was made pursuant to Delaware law. Delaware General Corporation Law provides that liabilities of corporations existing under the laws of that State shall not, in any way, be lessened by the consolidation or merger of two or more corporations.[12] (R. 4-6.) In *Wiley & Sons* the union had alternately relied on the New York Stock Corporation Law. While this Court held that the question of the survival of the collective bargaining agreement was a matter of Federal law, it also said that "State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case."[13]

There was no suggestion by the Court that the New York law, which was similar in scope to Delaware law, was applicable only to duties and obligations of a corporation other than those arising out of labor contracts. In the present case the Delaware law supports the position of the Brotherhood and, barring some overriding principle of Federal law, should be applied to require United to assume the obligations of the Brotherhood-Capital agreement. It is submitted that no such overriding Federal principle exists.

This again is a matter for judicial determination and not for arbitration.

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[12] This Delaware statute is quoted at page 44 of the Brotherhood's brief.

[13] 11 L.Ed.2d at page 904.

D. The Brotherhood-Capital Agreement Itself Provided That It Should Be Binding Upon United.

Article 1(b) of the collective bargaining agreement (R. 24) provided that all provisions of this agreement "shall be binding upon the successors or assigns of the Company." The National Mediation Board, pursuant to its authority under Section 5, Second of the Railway Labor Act to interpret the meaning of agreements executed in mediation, found that the language of the agreement was clear and unambiguous and meant just what it said. (R. 44.) This is a provision for which the Brotherhood bargained in negotiations under the Railway Labor Act with Capital and in anticipation of a transaction by which Capital would be purchased, consolidated, or merged with some other airline, and the Brotherhood is entitled to the enforcement of this provision unless there is some rule of law which prevents this. While it is true that United was not a party to the original Brotherhood-Capital agreement, it was put on notice by the Brotherhood of this provision within a few days after the merger contract was signed and long before the Civil Aeronautics Board approved the merger and it was consummated. It is, therefore, submitted that United proceeded with the merger with full knowledge of this provision and of the Brotherhood's position with respect thereto and as a consequence should not now be relieved from the obligations of Article 1(b) simply because it was not a party to the original contract. There was no similar contract provision in the Interscience agreement which was the subject of litigation in the *Wiley & Sons* case, so that the Court was not called upon to determine the effect of such a provision. United in its brief argues that this provision was not applicable to a merger. The reply to this argument is set forth, *supra*, pages 13, 14.

E. Limiting the Brotherhood's Relief Would Defeat the Objectives of Federal Law.

In *Wiley & Sons*, this Court stated that the objectives of national labor policy require that the right of owners of businesses to merge be balanced by some protection to the employees from the sudden change in the employment relationship. In that case, the objectives were met by granting the relief requested by the union of requiring the surviving corporation in the merger to arbitrate its continued obligations with respect to certain provisions of the agreement. It is submitted that these objectives would be defeated by limiting the Brotherhood to such relief in the present case.

Article 43, like all similar provisions, is designed to set up a procedure for the processing of grievances of individual employees. The interpretation or application of a collective bargaining agreement is simply incidental to the determination of the grievance. Thus, Article 43 contemplates a submission which shall include (1) the name of the employee, (2) efforts to obtain adjustment under Articles 30 and 31, which deal with individual grievances, (3) the nature of the dispute, and (4) the position or contention of the Brotherhood. (R. 29-33.) If the Brotherhood is limited to the relief suggested by the United States, the only questions respecting the interpretation and application of the Brotherhood-Capital agreement that will be submitted for determination by a board of adjustment under Article 43 will be those grievances which have been submitted to United and which the carrier refused to accept.

The only way that justice and the national labor policy can be achieved in the present situation is to

declare that the collective bargaining agreement did not terminate upon consummation of the merger and to require United to negotiate with the Brotherhood under Article 1(b) thereof for the procedure to be followed and the protection to be afforded the employees involved. A contrary rule would involve a manifest injustice to the employees and the Brotherhood and, as the Second Circuit observed in the *Wiley & Sons* case, "would be a breeder of discontent and unharmonious relations between employer and employees."[14]

F. Limiting of the Brotherhood Relief Would Be Inconsistent With Established Practices Under the Railway Labor Act.

The established practice under the Railway Labor Act over the years has been that, whenever a railroad or an airline merges, the surviving corporation assumes the obligations of the collective bargaining agreement and negotiates with the union to determine all questions and problems arising therefrom under the merger. This practice in the railroad industry is attested to in the record by the Affidavit of Mr. Dennis based on 30 years of experience in that industry, which reads in pertinent part as follows (R. 113):

> "My lengthy experience in the railroad industry, as indicated in paragraph 3 of this affidavit, has made me familiar with the practices and procedures of railroads in cases of mergers and consolidations. It is the customary practice in the railroad industry in the cases of mergers and consolidations for the surviving corporation to assume the collective bargaining agreements of the non-surviving carrier and then to work out the application thereof through implementing agreements

[14] 313 F. 2d 52, at page 56

such as is contemplated by Article 1(b) of the Agreement of August 3, 1959, here involved."

Examples of this practice in the airline industry appear in the record at R. 117-121. The Brotherhood knows of no instance in which a surviving carrier has taken the position that it would not assume the obligations of a collective bargaining agreement until United refused to do so in the present case.

If the Brotherhood was required to arbitrate with United the question of the survivorship of various provisions of the Brotherhood-Capital agreement following the merger, such a decision would be contrary to the long standing practice in the railroad and airline industries and be the cause of confusion and litigation. This result is not called for by the decision in *Wiley & Sons* or by any other principle of Federal law. To the contrary, it would defeat the objectives of Federal law enunciated in *Wiley & Sons*.

G. United Should Be Required to Negotiate With the Brotherhood Under Article 1(b) of the Brotherhood-Capital Agreement.

Assuming *arguendo* that the relief granted to the Brotherhood should be limited to a determination as suggested by the memorandum of the United States, the Brotherhood submits that United should also be required to meet and negotiate with the Brotherhood in good faith with respect to the application of the collective bargaining agreement prior o any arbitration. Article 1(b), in accordance with the prevailing practice in the railroad and airline industries, provided for negotiations concerning the procedure to be followed and the protection to be afforded employees involved in the case of a merger or consoli-

dation of Capital with another airline. No useful purpose would be served in requiring the Brotherhood and United to arbitrate questions concerning the continuation of the Brotherhood-Capital agreement following the merger if the dispute between the Brotherhood and United could be solved by good faith negotiations pursuant to A ticle 1(b). Such negotiations have never taken place because United could not undertake such negotiations in the light of its position that the Brotherhood-Capital agreement terminated with the merger. To require United to now undertake such negotiations would be consistent with the entire tenor of the Railway Labor Act, which requires carriers and employees and their representatives to make every reasonable effort to settle disputes between them through meetings and conferences with arbitration merely a last resort. Indeed, Section 3 of the Railway Labor Act requires such handling of disputes prior to any submission to the National Railroad Adjustment Board and Article 43 itself contemplates such efforts of adjustment prior to the use of the adjustment board procedures provided by that Article. (R. 33.) Thus, it is submitted that if the Court agrees with the position set forth in the memorandum of the United States, that it should not only declare that the dispute between the Brotherhood and United is amenable to arbitration under the adjustment board procedures provided by Article 43 but make it clear that United is required in good faith to attempt negotiations to adjust its dispute with the Brotherhood prior to the invocation of arbitration before such board.

CONCLUSION

Upon the basis of the points and authorities in the petitioner's brief and its reply brief, it is submitted that the judgment of the Court of Appeals should be reversed upon the grounds (1) that the dispute between the Brotherhood and United, set forth in the complaint in the District Court, did not give rise to a representation controversy within the exclusive jurisdiction of the National Mediation Board but to a dispute concerning the present status of the Brotherhood-Capital agreement, (2) that the Brotherhood-Capital agreement did not terminate upon the consummation of the United-Capital merger, and (3) that the Brotherhood is entitled to enforcement of that agreement, including, but not limited to, a requirement that United negotiate in good faith with the Brotherhood in accordance with Article 1(b) thereof.

Respectfully submitted,

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